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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 192.

THEODORE M. DAVIS, RECEIVER OF THE OCEAN NATIONAL BANK OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

HARVEY W. BROWN AND JAMES G. BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 19, 1874.



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INDEX.

	Original.	Print.
Præcipe for summons	2	1
Bond for costs	3	2
Summons	4	2
Declaration	6	3
Alias summons	119	40
Plea and notice	121	40
Stipulation as to proof of notes, &c	129	43
Stipulation to waive jury	130	44
Jury waived and hearing	131	44
Finding and judgment, &c	132	44
Bill of exceptions	135	45
Supersedeas bond	149	50
Certificate to transcript	152	51
Writ of error	153	51
Citation	155	51

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 1873.

THEODORE M. DAVIS, RECEIVER, &c.,
vs.
HARVEY W. BROWN & JAMES G. BROWN. } In assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the
4 plaintiff of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 28th day of Novem., A. D. 1873.

HENRY G. MILLER.

(Endorsed:) Filed Nov. 28th, A. D. 1873. Wm. H. Bradley, clerk.

And on the same day, to wit, the 28th day of November, A. D. 1873, a writ of summons issued out of said clerk's office against said defendants in said entitled cause, which said writ of summons, together with the return of the marshal thereon endorsed reads, in the words and figures following, to wit:

Writ of summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting.

We command you to summon Harvey W. Brown and James G. Brown, if found in your district, to be and appear before our judges of our
5 circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago in the district aforesaid, on the third Monday of December next, to answer unto Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, of a plea of trespass on the case upon promises, to his damage, as he alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Nathan Clifford, acting chief-justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 28th day of November, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY,
Clerk.

I did not serve Harvey W. Brown and James G. Brown, the defendants therein named, being unable to find them within my district.

December 15th, A. D. 1873.

B. H. CAMPBELL,
U. S. Marshal.
By T. R. BIRD, *Dep'ty.*

(Endorsed:) Filed Dec. 15th, A. D. 1873. Wm. H. Bradley, clerk.

6 And afterwards, to wit, on the 3rd day of December, A. D. 1873, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois, December term, A. D. 1373.

Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, who is a citizen of the State of New York, plaintiff in this suit, by Miller and Frost, his attorneys, complains of Harvey W. Brown and James G. Brown, who are citizens of the State of Illinois, and residents of said northern district of Illinois, defendants in this suit, who have been summoned to answer the said plaintiff of a plea of trespass on the case upon promises.

For that whereas one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain promissory note in writing, bearing date a certain day and year therein men-
7 tioned, to wit, the day and year aforesaid, & thereby then and there promised to pay at office Citizens' Gas-Light Co., thirty two months after the date thereof, to the order of himself, the sum of five hundred dollars for value received with interest.

And the said G. E. McComber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, indorsed the said promissory note in writing in blank, by which said endorsement, he, the said G. E. McOmber, then and there ordered & appointed the said sum of money in the said promissory note specified, to be paid to the bearer, & then and there delivered the said promissory note so endorsed as aforesaid to the said defendants, and the said defendants to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, & abbrevia-
tions of H. W. Brown & J. G. Brown, then & there ordered and
8 appointed the said sum of money in the said promissory note specified, to be paid to the said plaintiff, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff.

And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of February, in the year of our Lord one thousand eight hundred and seventy-three, at the office Citizens' Gas-Light Co., aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then &

there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McComber, did or would at the said time when the said promissory note *are* presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, and the said promissory note was thereupon then & there duly protested for the non-payment thereof, and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & twenty-eight cents.

9 And the said plaintiff avers that said promissory note was made in the State of New York, and that the said sum of money therein specified was therein and thereby made specially payable at office Citizens' Gas-Light Co. in said State of New York, & that the legal rate of interest for the forbearance and giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars p'r annum for each one hundred dollars so forborne.

Of all which said several premises, the said defendants afterwards, to wit, on the day and year last aforesaid, at, to wit, the northern district of Illinois aforesaid, had notice, by means whereof & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, undertook, & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest

10 thereon, at the rate aforesaid, to together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day and year aforesaid, & thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-two months after the date thereof, to the order of himself, the sum of five hundred dollars for value received, with interest, and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, & before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at, to wit, the northern district of Illinois aforesaid, indorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff; and the said defendants afterwards, and before the delivery of said note to said plaintiff, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would

11 accept the said promissory note, & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note, by an endorsement in

writing on said note, by the names and styles of H. W. Brown & J. G. Brown, guaranteed, & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified, as & when the same should become due & payable, according to the tenor and effect thereof, and that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested; and that said note, so endorsed, was afterwards, to wit, on the day and year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff did then & there accept the said note, & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, until the same should become due & payable according to the tenor & effect of said note.

And the said plaintiff avers that afterwards when the said promissory note became due & payable according to the tenor and effect thereof, to wit, on the twentieth day of February, in the year of our Lord one thousand eight hundred & seventy-three, at the office Citizens'
12 Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required according to the tenor and effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; & the said plaintiff avers that the cost of protesting the same as aforesaid, was the sum of one dollar & twenty-eight cents; and the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co. in said State of New York, & that the legal rate of interest for the forbearance and giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

13 Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at, to wit, the northern district of Illinois aforesaid, have notice, by means whereof & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seven-

teenth day of June, A.D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-three months after the date
14 thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said defendants; and the said defendants, to whom, or to whose order, the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the name, style, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then and there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff; and the said plaintiff avers that afterwards,
15 when the said promissory note became due and payable, according to the tenor & effect thereof, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred & seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented and shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar and twenty-two cents; and the said plaintiff avers that said promissory note was made in the State of New York, and that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said
16 promissory note, and ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne; of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at, to wit, the northern district of Illinois aforesaid, had notice; by means whereof, & by force of the statute in such case made and provided, the said defendants then and there became liable to pay to the said plaintiff the said sum of money in

the said promissory note specified, together with interest therein at the rate aforesaid, together with the cost of protesting the same as aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other
17 promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day and year aforesaid, and thereby then & there promised to pay at office Citizens' Gas-Light Co., thir three months after the date thereof, to the order of himself, the sum o five hundred dollars, for value received, with interest, & the said G. E. McOmber, to whose order the payment of said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, & before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, at, to wit, the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then and there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff; and the said defendants afterwards, & before the delivery of said note to said plaintiff, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note, & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note, by endorsement in writing on said note, by the names & styles of H. W. Brown &
18 J. G. Brown, guaranteed, and then & there undertook & promised, the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified, as & when the same should become due and payable, according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested; & that said note, so endorsed, was afterwards, to wit, on the day and year aforesaid, to wit, at said district, delivered to the said plaintiff, & the said plaintiff did then & ther accept the said note, & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified until the same should become due & payable according to the tenor & effect of said note.

And the said plaintiff avers that afterwards, when the said promissory note became due & payable according to the tenor & effect thereof, to wit, on the twentieth day of March, in the year of our Lord one thousand eight hundred and seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, &

payment of the said sum of money therein specified was then &
19 there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & twenty-two cents; and that said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co. in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne. Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at, to wit, the northern district of Illinois aforesaid, had notice, by means
20 whereof & by force of the statute in such case made & provided the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, & being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, & thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-four months after the date thereof, to the order of himself, the sum of five hundred dollars for value received, with interest, and the said G. E. McOmber, to whose
21 order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing, in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, and then & there delivered the said promissory note, so endorsed as aforesaid, to the said defendants; and the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid,

endorsed the said promissory note, by which said endorsement they, the said defendants, by the name, style, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff; and the said plaintiff avers that afterwards, when the said promissory note became due & payable according to the tenor & effect thereof, to wit, on the twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then & there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would, at the said time when the said promissory note was presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar and twenty-eight cents; and the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein and thereby made specially payable at office Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne. Of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at, to wit, the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day and year aforesaid, & thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-four months after the date thereof, to the order of himself, the sum of five hundred dollars for value received, with interest, and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note & before

the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff. And the said defend-
25 ants afterwards, and before the delivery of said note to said plaintiff, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note, by an endorsement in writing on said note, by the names & styles of H. W. Brown and J. G. Brown, guaranteed, & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified, as & when the same should become due and payable, according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested; and that said note so endorsed was afterwards, to wit, on the day & year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff did then & there accept the said note & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified until the same should become due & payable according to the tenor & effect of said note; and the said plaint-
26 iff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there *was* duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would, at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, and the said promissory note was thereupon then & there duly protested for the non-payment thereof; & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & twenty-eight cents; and the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was,
27 at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne. Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at, to wit, the northern district of Illinois aforesaid, had notice, by means whereof & by force of the statute in such case made and provided, the said defendants then & there became liable to pay to the

said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, one G. E. McOmber, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain promissory note in
28 writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-five months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest, and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said defendants; and the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district af Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, & abbreviations of H. W.
29 Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory specified to be paid to the said plaintiff, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff. And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused, so to do, & the said promissory note was thereupon then and there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said plaintiff avers that said promissory note was made in the

30 State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co. in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was at the time of the making of said promissory note & ever since has been & still is the sum or rate of seven dollars per annum for each one hundred dollars so forborne. Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice; by means whereof & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid when they, the said defendants, should be thereunto afterwards requested.

31 And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby & then & there promised to pay at office Citizens' Gas-Light Co., thirty-five months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest, and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note & before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff, and the said defendants afterwards & before the delivery of said note to said plaintiff, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G.

32 E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note by an endorsement in writing on said note, by the names & styles of H. W. Brown & J. G. Brown, guaranteed & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified, as & when the same should become due & payable, according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber, at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff, when they should be thereunto afterwards requested, and that the said note so endorsed was afterwards, to wit, on the day & year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff

did then & there accept the said note & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified, until the same should become due & payable, according to the tenor & effect of said note. And the said plaintiff avers that afterwards when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of May, in the year of our Lord one thousand eight hundred & seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, according to the tenor & effect of the said promissory note; but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time, when the said promissory note was presented & showed for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar and thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co. in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne, of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereby & by force of the statute in such case made & provided, the said defendant then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook, & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

33

34

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit, at the northern district of Illinois, made his certain other promissory note, in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-six months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois

35

aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said defendants, and the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the name, style, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff; and the said plaintiff avers that afterwards, when the said promissory note became due and payable according to the tenor & effect thereof, to wit, on the twentieth day of June, in the year of our Lord one thousand eight hundred & seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois
36 aforesaid, the said promissory note was duly presented & shown for payment thereof, & and payment of the said sum of money therein specified was then & there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, and the said promissory note was thereupon then & there duly protested for the non-payment thereof, and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & twenty-eight cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office Citizens' Gas-Light Co. in said State of New York, & that the legal rate of interest for the forbearance and giving time for the payment of money in said State of New York was at the time of the making of said promissory note, and ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne. Of all which said several premises the said defendants afterwards, to wit,
37 on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook, & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit, at the nothern district of Illinois aforesaid, made his certain other promissory note, in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at office Citizens' Gas-Light Co., thirty-six months after the date thereof, to the order of himself, the sum of five hundred dollars,
38 for value received, with interest.

And the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff. And the said defendants afterwards, and before the delivery of said note to said plaintiff, to wit, on the day and year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note by endorsement in writing on said note, by the names & styles of H. W. Brown & J. G. Brown, guaranteed, & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said
39 promissory note specified as & when the same should become due & payable, according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested, and that said note so endorsed was afterwards, to wit, on the day and year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff did then & there accept the said note & give to the said G. E. McOmber time for the payment of the said sum of money therein specified until the same should become due & payable, according to the tenor & effect of said note; and the said plaintiff avers that afterwards, when the said promissory note became due & payable according to the tenor & effect thereof, to wit, on the twentieth day of June, in the year of our Lord one thousand eight hundred & seventy-three, at the office Citizens' Gas-Light Co. aforesaid, to wit, at the nothern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time, when the said promissory note was pre-
40 sented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but wholly neglected & refused so to do, and the said promissory note was thereupon then & there duly protested for the non-payment thereof, and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar and twenty-eight cents, and the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein

specified was therein & thereby made specially payable at office Citizens Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne, of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice; by means whereof & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate
41 aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook, & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay, at office Citizens' Gas-Light Co., thirty-seven months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest.

And the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year afore-
42 said, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said defendants.

And the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, and abbreviations of H. W. Brown & J. G. Brown, then & there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff.

And the said plaintiff avers that afterwards, when the said
43 promissory note became due & payable according to the tenor & effect thereof, to wit, on the twentieth day of July, in the year of our Lord one thousand eight hundred and seventy-three, at Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois afore-

said, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented & shewn for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof, & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & twenty-eight cents. And the said plaintiff avers
44 that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne, of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid when they, the said defendants, should be thereunto afterwards requested, & being so liable that the said defendants, in
45 consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, thereby then & there promised to pay at Citizens' Gas-Light Co., thirty-seven months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note
46 & before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff. And the said defendants afterwards, and before the delivery of said note to said plaintiff, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G. E. McOmber time for the

payment of the said sum of money therein specified, according to the tenor & effect of said note, by endorsement in writing on said note, by the names & styles of H. W. Brown & J. G. Brown, guaranteed & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified as & when the same should become due & payable according to the tenor & effect thereof, & that in
47 case of the non-payment thereof by the said G. E. McOmber, att he maturity thereof, then that they the said defendants would pay the same to the said plaintiff, when they should be thereunto afterwards requested, and that said note, so endorsed, was afterwards, to wit, on the day & year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff did then & there accept the said note, & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified until the same should become due & payable, according to the tenor & effect of said note. And the said plaintiff avers that afterwards, when the said promissory note became due & payable according to the tenor & effect thereof, to wit, on the twentieth day of July, in the year of our Lord one thousand eight hundred & seventy-three, at the Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, accord-
48 ing to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. McOmber, did or would at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & twenty-eight cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate
49 of seven dollars per annum for each one hundred dollars so forborne, of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice; by means whereof & by force of the statute in such case made & provided the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

50 And whereas also one G. E. McOmber, heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at Citizens' Gas-Light Co., thirty-eight months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest. And the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the
51 said promissory note so endorsed as aforesaid to the said defendants. And the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff. And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of August, in the year of our Lord one thousand eight hundred & seventy-three, at the Citizens' Gas-Light Co. aforesaid, to wit, at the northern
52 district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber, nor any person or persons on behalf of the said G. E. McOmber, did, or would at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof, & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the
53 forbearance & giving time for the payment of money in said State of New York was at the time of the making of said promissory note, & ever since has been & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises, the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there

became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested, & being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully
54 promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon, at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, one G. E. McOmber, heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at Citizens' Gas-Light Co., thirty-eight months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest, & the said G. E. McOmber, to whose order the payment of the said sum of money in said promissory note
55 specified was to be made, after the making of the said promissory note, & before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff; and the said defendants afterwards, and before the delivery of said note to said plaintiff, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note, & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note, by endorsement in writing on said note, by the names & styles of H. W. Brown & J. G. Brown, guaranteed & then & there undertook and promised the
56 said plaintiff that he, said G. E. McOmber, would pay to the said plaintiff the said sum of money in said promissory note specified as & when the same should become due & payable, according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested; & that said note so endorsed was afterwards, to wit, on the day & year aforesaid, to wit, at said district aforesaid, delivered to the said plaintiff, & the said plaintiff did then & there accept the said note, & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified until the same should become due & payable, according to the tenor & effect of said note; and the said plaintiff avers that afterwards, when the said promissory note become due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of August, in the year of our Lord one thousand eight hundred & seventy-three, at Citizens' Gas-Light Co., aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment there-
57 of, & payment of the said sum of money therein specified was

then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. McOmber did or would, at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non payment thereof; & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at Citizens' Gas-Light Co., in said State of New York, & that the legal note of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, &
58 still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

59 And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at Citizens' Gas-Light Co., thirty-nine months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest. And the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said defendants;
60 and the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid,

endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff. And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of Sepetember, in the year of our Lord one thousand eight hundred & seventy-three, at Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified
61 was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. McOmber did or would, at the said time when the said promissory-note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, and the said promissory note was thereupon then & there duly protested for the non-payment thereof; & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, &
62 still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne. Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice; by means thereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

63 And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, & thereby then & there promised to pay at Citizens' Gas-Light Co., thirty-nine months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note & before the payment of the said sum of money therein specified, to wit,

on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promis-
64 sory note so endorsed as aforesaid to the said plaintiff; and the said defendants afterwards, & before the delivery of said note to said plaintiff, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note, by an endorsement in writing on said note, by the names & styles of H. W. Brown & J. G. Brown, guaranteed & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the plaintiff the said sum of money in said promissory note specified as and when the same should become due & payable, according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested; & that said note so endorsed was afterwards, to wit, on the day &
65 year aforesaid, to wit, at said district, delivered to the said plaintiff, & the said plaintiff did then & there accept the said note, & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified, until the same should become due and payable according to the tenor & effect of said note.

And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor and effect thereof, to wit, on the twentieth day of September, in the year of our Lord one thousand eight hundred & seventy-three, at the Citizens' Gas-Light Co. aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. Omber did or would, at the said time when the said promissory note was presented & shown for payment thereof
66 as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; & the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at Citizens' Gas-Light Co., in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made and provided, the said defendants
67 then & there became liable to pay to the said plaintiff the said sum

of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, New York, to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there
68 promised to pay, at office of the Citizen's Gas-Light Company, forty months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said defendants.

And the said defendants, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to wit, on the day &
69 year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff; and the said plaintiff avers that afterwards, when the said promissory note became due & payable according to the tenor & effect thereof, to wit, on the twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-three, at the office of the Citizens' Gas-Light Company aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented and shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said E. G. Mc-
70 Omber did or would, at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar and

thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, and that the said sum of money therein specified was therein & thereby made specially payable at office of the Citizens' Gas-Light Company, in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises the said defendants after-
71 wards, to wit, on the day & year last aforesaid, at, to wit, the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit,
72 at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay, at the office of the Citizens' Gas-Light Company, forty months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note & before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid to the said plaintiff, and the said defendants afterwards, & before the delivery of said note to said plaintiff, to wit, on the day & year last
73 aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G. E. McOmber time for the payment of the said sum of money therein specified, according to the tenor & effect of said note, by endorsement in writing on said note, by the names & styles of H. W. Brown & J. G. Brown guaranteed, & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified as & when the same should become due & payable according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that they, the said defendants, would pay the same to the said plaintiff when they should be thereunto afterwards requested; and that said note so

endorsed was afterwards, to wit, on the day & year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff did then & there accept the said note & give to the said G. E. McOm-
74 ber time for the payment of the said sum of money therein specified until the same should become due & payable according to the tenor & effect of said note; and the said plaintiff avers that afterwards, when the said promissory note became due & payable according to the tenor and effect thereof, to wit, on the twentieth day of October, in the year of our Lord one thousand eight hundred & seventy-three, at the office of the Citizens' Gas-Light Company aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. McOmber did or would at the said time when the said promissory note was presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do,
75 & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents; and the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at the office of the Citizens' Gas-Light Company, in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money
76 in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit, at the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein
77 mentioned, to wit, the day & year aforesaid, & thereby then & there promised to pay at office of Citizens' Gas-Light Company forty-one months after the date thereof, to the order of himself the sum of five hundred dollars for value received with interest.

And the said G. E. McOmber, to whose order the payment of the

said sum of money in the said promissory note specified, was to be made after making of the said promissory note before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in writing in blank, on which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note so endorsed as aforesaid, to the said defendants, and the said defendants to whom or to whose order the payment of the said sum of money in the said promissory note specified, was to be made, after the making of the said promissory note, before the payment of the said sum of money therein specified, to
78 wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note, by which said endorsement they, the said defendants, by the names, styles, & abbreviations of H. W. Brown & J. G. Brown, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff. And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of November, in the year of our Lord one thousand eight hundred & seventy-three, at office of Citizens' Gas-Light Company aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. McOmber did or would, at the said
79 time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof; and the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office of Citizens' Gas-Light Company, in said State of New York, & that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises the said defendants afterwards,
80 to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice; by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; & being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of

money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, A. D. 1870, at Saratoga Springs, to wit, at
81 the northern district of Illinois aforesaid, made his certain other promissory note in writing, bearing date a certain day & year therein mentioned, to wit, the day and year aforesaid, & thereby then & there promised to pay at office of Citizens' Gas-Light Company, forty-one months after the date thereof, to the order of himself, the sum of five hundred dollars, for value received, with interest; and the said G. E. McOmber, to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note & before the payment of the said sum of money therein specified, to wit, on the day & year aforesaid, to wit, at the northern district of Illinois aforesaid, endorsed the said promissory note in blank, by which said endorsement he, the said G. E. McOmber, then & there ordered & appointed the said sum of money in the said promissory note specified to be paid to the bearer, & then & there delivered the said promissory note, so endorsed as aforesaid, to the said plaintiff. And the said defendants afterwards, & before the delivery of said note
82 to said plaintiff, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, in consideration that the said plaintiff would accept the said promissory note & give to the said G. E. McOmber time for the payment of the said sum of money therein specified according to the tenor & effect of said note by endorsement in writing on said note by the names & style of H. W. Brown & J. G. Brown, guaranteed & then & there undertook & promised the said plaintiff that the said G. E. McOmber would pay to the said plaintiff the said sum of money in said promissory note specified as & when the same should become due & payable according to the tenor & effect thereof, & that in case of the non-payment thereof by the said G. E. McOmber at the maturity thereof, then that the said defendants would pay the same to the said plaintiff when they should be thereunto afterwards requested, & that said note so endorsed was afterwards, to wit, on the day & year aforesaid, to wit, at said district, delivered to the said plaintiff, and the said plaintiff did then & there accept the said note & gave to the said G. E. McOmber time for the payment of the said sum of money therein specified, until the same should become due & payable according to the tenor & effect of said note.

83 And the said plaintiff avers that afterwards, when the said promissory note became due & payable, according to the tenor & effect thereof, to wit, on the twentieth day of November, in the year of our Lord one thousand eight hundred and seventy-three, at office of Citizens' Gas-Light Company aforesaid, to wit, at the northern district of Illinois aforesaid, the said promissory note was duly presented & shown for payment thereof, & payment of the said sum of money therein specified was then & there duly required, according to the tenor & effect of the said promissory note, but that neither the said G. E. McOmber nor any person or persons on behalf of the said G. E. McOmber did or would, at the said time when the said promissory note was presented & shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected & refused so to do, & the said promissory note was thereupon then & there duly protested for the non-payment thereof

& the said plaintiff avers that the cost of protesting the same as aforesaid was the sum of one dollar & thirty cents. And the said
84 plaintiff avers that said promissory note was made in the State of New York, & that the said sum of money therein specified was therein & thereby made specially payable at office of Citizens' Gas-Light Company, in said State of New York; and that the legal rate of interest for the forbearance & giving time for the payment of money in said State of New York was, at the time of the making of said promissory note, & ever since has been, & still is, the sum or rate of seven dollars per annum for each one hundred dollars so forborne.

Of all of which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, had notice, by means whereof, & by force of the statute in such case made & provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested; & being so liable they, the said defendants, in consideration thereof,
85 afterwards, to wit, on the day & year last aforesaid, to wit, at the northern district of Illinois aforesaid, undertook & then & there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, together with interest thereon at the rate aforesaid, together with the cost of protesting the same aforesaid, when they, the said defendants, should be thereunto afterwards requested.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, thirty-two months after date, five hundred dollars, with interest at office Citizens' Gas-Light Co., for value received; and the said G. E. McOmber, to whom, or to whose order, the payment of the said sum of money in the said note specified was to
86 be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note so endorsed to the said defendants; and the said defendants, by the names & styles of H. W. Brown & J. G. Brown, to whom, or to whose order, the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said
87 note so endorsed to the said plaintiff, of which said endorsements so made thereon as aforesaid the said defendant afterward, to wit, on the same day and year and at the place aforesaid, had notice; & the

said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution and prosecution of a suit against him on said note in said State of Illinois then, & ever since would have been, & still would be, wholly unavailing; by reason whereof, and by force of the statute in such case made & provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsements so thereon made as aforesaid; and, being so liable, the said defendants, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified,
88 according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, N. Y., at the northern district of Illinois, aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, thirty-three months after date, five hundred dollars, with interest, at office Citizens' Gas-Light Co., for value received, and the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made, as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed
89 the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note, so endorsed, to the said defendants, and the said defendants, by the names & styles of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made, as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note, so endorsed, to the said plaintiff, of which said endorsements so made thereon as aforesaid the said defendant afterward, to wit, on the same day and year,
90 and at the place aforesaid, had notice. And the said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been, & still would be, wholly unavailing. By reason whereof, and by force of the statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsements so thereon made as aforesaid; and being so liable, the said

defendants, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

91 And whereas, also, one G. E. McOmber, heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, thirty-four months after date, five hundred dollars, with interest, at office Citizens' Gas-Light Co., for value received. And the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made, as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note, so en-

92 dorsed, to the said defendants, & the said defendants, by the names and style of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note, so endorsed, to the said plaintiff, of which said endorsements so made thereon, as aforesaid, the said defendant, afterward, to wit, on the same day and year, and at the place aforesaid, had notice; & the said plaintiff avers that, at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been, & still would be, wholly unavailing. By reason whereof, and by force of the

93 statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsements so thereon made as aforesaid; and being so liable, the said defendants, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And whereas also one G. E. McOmber heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly

called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, thirty-five months after date, five hundred dollars, with
94 interest, at office Citizens' Gas-Light Co., for value received. And the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note so endorsed to the said defendants, & the said defendants, by the names & styles of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed to the said plaintiff, of which said endorsements so made thereon as aforesaid, the said defendant afterward, to wit, on the same day and year and at the place aforesaid had notice, & the said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would
95 be wholly unavailing. By reason whereof and by force of the statute in such case made & provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsements so thereon made as aforesaid, and being so liable the said defendants, in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order
96 of himself, thirty-six months after date, five hundred dollars, with interest, at office Citizens' Gas-Light Co., for value received; and the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the

contents of the said note to be paid to the said defendants or order, and then and there delivered the said note so endorsed to the said defendants, & the said defendants, by the names & style of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note
97 in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order and then and there delivered the said note so endorsed to the said plaintiff, of which said endorsements so made thereon as aforesaid the said defendant afterward, to wit, on the same day and year and at the place aforesaid, had notice, & the said plaintiff avers that at the time of the maturity of such promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would be wholly unavailing. By reason whereof and by force of the statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said endorsements so thereon made as aforesaid; and being so liable the said defendants in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid,
98 undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber, heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, thirty-seven months after date, five hundred dollars, with interest, at Citizen's Gas-Light Co., for value received. And the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof,
99 to wit, on the same day and year and at the place aforesaid endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note so endorsed to the said defendants, & the said defendants, by the names & styles of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then

and there delivered the said note so endorsed to the said plaintiff, of which said endorsements so made thereon as aforesaid, the said defendant afterward, to wit, on the same day and year and at the place aforesaid had notice, & the said plaintiff avers that at the time of the maturity of said promissory note when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would be wholly unavailing. By reason whereof and by force of the statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the
100 said note, and of the said endorsements so thereon made as aforesaid; and being so liable, the said defendants in consideration thereof, afterward, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber, heretofore, to wit, the said defendant on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, thirty-eight months after date, five hundred dollars, with interest, at Citizens Gas-Light Co., for value received. And the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to
101 be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment there of, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note so endorsed to the said defendants, & the said defendants, by the names & styles of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed
102 the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed to the said plaintiff, of which said endorsements so made thereon as aforesaid, the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, had notice, & the said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would be wholly unavailing. By reason whereof and by force of the statute in such case

made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified ac-
103 cording to the tenor and effect of the said note and of the said endorsements so thereon made as aforesaid; and being so liable the said defendants in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber. heretofore, to wit, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, N. Y., to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to
104 pay to the order of himself, thirty-nine months after date, five hundred dollars, with interest, at Citizens Gas Light Co., for value received. And the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note so endorsed to the said defendants, & the said defendants, by the names & style of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid,
105 afterward, and before the payment of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed to the said plaintiff, of which said endorsements so made thereon as aforesaid the said defendant afterward, to wit, on the same day and year and at the place aforesaid had notice, & the said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution &
106 prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would be wholly unavailing. By reason whereof and by force of the statute in such case made and provided, the said defendants became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note, and of the said endorsements so thereon made as aforesaid; and being so liable, the said defendants, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber, heretofore, to wit, on the sev-

enteenth day of June, in the year of our Lord one thousand eight
107 hundred and seventy, at Saratoga Springs, New York, to wit, at the northern district of Illinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, forty months after date, five hundred dollars, with interest, at the office of the Citizens' Gas-Light Company, for value received. And the said G. E. Mcomber, to whom, or to whose order, the payment of the said sum of money in the said note specified, was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said defendants or order, and then and there delivered the said note, so endorsed, to the said defendants, & the said defendants,
108 by names & style of H. W. Brown & J. G. Brown, to whom, or to whose order, the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed to the said plaintiff, of which said endorsements, so made thereon as aforesaid, the said defendant afterward, to wit, on the same day and year, and at the place aforesaid, had notice, & the said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due & payable, the
109 said G. E. McOmber was not a resident of the State of Illinois, & that the institution and prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would be wholly unavailing. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note and of the said endorsements so thereon made as aforesaid; and being so liable, the said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid.

And whereas, also, one G. E. McOmber, heretofore, to wit, on
110 the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy, at Saratoga Springs, to wit, at the northern district of Ilinois aforesaid, made a certain other note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, by which said note the said G. E. McOmber promised to pay to the order of himself, forty-one months after date, five hundred dollars, with interest, at office of Citizens' Gas-Light Company, for value received. And the said G. E. McOmber, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterward, and before the payment

of the said sum of money mentioned in the said note or any part thereof, and also before the time limited and appointed by the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to
111 the said defendants or order, and then and there delivered the said note so endorsed to the said defendants, & the said defendants, by names & styles of H. W. Brown & J. G. Brown, to whom or to whose order the payment of the said sum of money in the said note specified was to be made as aforesaid, afterwards, and before the payment of the said sum of money mentioned in the said note, or any part thereof, and also before the time limited and appointed in the said note for the payment thereof, to wit, on the same day and year, and at the place aforesaid, endorsed the said note in writing, and by that endorsement ordered and appointed the contents of the said note to be paid to the said plaintiff or order, and then and there delivered the said note so endorsed to the said plaintiff, of which said endorsements, so made thereon as aforesaid, the said defendent afterward, to wit, on the same day and year and at the place aforesaid had notice, & the said plaintiff avers that at the time of the maturity of said promissory note, when the said sum of money therein specified became due and payable, the said G. E. McOmber was not a resident of the State of Illinois, & that the institution & prosecution of a suit against him on said note in said State of Illinois then & ever since would have been & still would be wholly unavailing. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note and of the said endorsements so thereon made as aforesaid, and being so liable the said defend-
112 ant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said note specified according to the tenor and effect of the said note, and of the said endorsement so thereon made as aforesaid. And whereas, also, the said defendants afterwards, to wit, on the 27th day of November, in the year of our Lord one thousand eight hundred and seventy-three, at the place aforesaid, were indebted to the said plaintiff in the sum of ten thousand dollars, lawful money of the United States of America, for so much money before that time lent and advanced by the said plaintiff to the said defendants, and at the special instance and request of the said defendants, and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and at the like request of the said defendants, and for other money
113 by the said defendants before that time had and received to and for the use of the said plaintiff, and being so indebted, the said defendants in consideration thereof afterward, to wit, on the same day and year aforesaid, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in this count mentioned when the said defendants should be thereunto afterwards requested; and whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrear and unpaid, and upon such

accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars of lawful money as aforesaid, and being so found in arrear and indebted to the said plaintiff, the said defendants in considera-
114 tion thereof, afterward, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised to the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants (although often requested, etc., to wit, on the several days when the said several notes became due and payable according to the tenor and effect thereof, and oftentimes since, to wit, at the place aforesaid) have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore the said plaintiff bring' suit, etc.

MILLER AND FROST,
Plaintiff's Attorneys.

Copies of notes sued on.

$500.] SARATOGA SPRINGS, N. Y., *June* 17, 1870.

115 Thirty-two months after date I promise to pay to the order of myself five hundred dollars at office Citizens' Gas-Light Co., with interest, value received.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

$500.] SARATOGA SPRINGS, N. Y., *June* 17, 1870.

Thirty-three months after date I promise to pay to the order of myself five hundred dollars at office Citizens' Gas-Light Co., with interest, value received.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

$500.] SARATOGA SPRINGS, *June* 17, 1870.

Thirty-four months after date I promise to pay to the order of myself five hundred dollars at office Citizens' Gas-Light Co., value received, with interest.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

116 $500.] SARATOGA SPRINGS, N. Y., *June* 17, 1870.

Thirty-five months after date I promise to pay to the order of myself five hundred dollars at office Citizens' Gas-Light Co., with interest, value received.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

$500.] SARATOGA SPRINGS, *June* 17, 1870.

Thirty-six months after date I promise to pay to the order of myself five hundred dollars at office Citizens' Gas-Light Co., with interest, value received.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

$500.] SARATOGA SPRINGS, N. Y.

Thirty-seven months after date I promise to pay to the order of myself five hundred dollars at Citizens' Gas-Light Co., value received, with interest.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

117 $500.] SARATOGA SPRINGS, N. Y., *June* 17, 1870.

Thirty-eight months after date I promise to pay to the order of myself five hundred dollars at Citizens' Gas-Light Co., with interest, value received.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

$500.] SARATOGA SPRINGS, N. Y., *June* 17, 1870.

Thirty-nine months after date I promise to pay to the order of myself five hundred dollars at Citizens' Gas-Light Co., with interest, value received.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

$500.] SARATOGA SPRINGS, NEW YORK, *June* 17, 1870.

Forty months after date I promise to pay to the order of myself five hundred dollars at the office of the Citizens' Gas-Light Company, value received, with interest.

(Signed) G. E. McOMBER.

118 (Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

SARATOGA SPRINGS, *June* 17, 1870.

Forty-one months after date I promise to pay to the order of myself five hundred dollars at office of Citizens' Gas-Light Company, value received, with interest.

(Signed) G. E. McOMBER.

(Endorsed:) G. E. McOmber. H. W. Brown. J. G. Brown.

Copy of a/c sued on.

Harvey W. Brown & James G. Brown in a/c with Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, Dr.

1873.				
Nov. 27.	To money	lent & advanced		$10 000
"	"	"	laid out & expended	10 000
"	"	"	had & rec'd to plff.'s use	10 000
"	"	"	amount found due on a/c, stated	10 000

(Endorsed:) Filed Dec. 3, 1873. Wm. H. Bradley, clk.

119 And afterwards, to wit, on the 7th day of January, A. D. 1874, an alias writ of summons issued out of said clerk's office in said-entitled cause, which said writ, together with the return of the marshal thereon, reads in the words & figures following, to wit:

Alias writ of summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you again to summon Harvey W. Brown and James G. Brown, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, of a plea of trespass on the case upon promises to the damage, as it alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the
120 Supreme Court of the United States of America, at Chicago aforesaid, this seventh day of January, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Served the within writ by reading the same to & in the presence & hearing of James G. Brown, therein named, on the 9th day of January, A. D. 1874. Did not serve the other defendant therein named, not being able to find him in my district.

B. H. CAMPBELL,
U. S. Marshal.
A. C. CAMPBELL,
Deputy.

(Endorsed:) Filed 10th January, A. D. 1874. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 28th day of February, A. D. 1874, said defendants, by their attorneys, filed in said clerk's office
121 their plea and notice in said entitled cause; which said plea and notice are in the words and figures following, to wit:

Plea.

United States circuit court, northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THEO. M. DAVIS, REC'V'R OCEAN NAT'L BANK, }
vs.
JAS. G. AND HARVEY W. BROWN. }

Come the said defendants, James G. Brown and Harvey W. Brown, by Walker, Dexter & Smith, their attorneys, and defend the wrong and injury where, etc., and say that they did not promise in manner and form as the plaintiff has above thereof complained against them; and of this they put themselves upon the country.

WALKER, DEXTER & SMITH,
Attys. for Defts.

Notice.

United States circuit court, northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THEO. M. DAVIS, RECEIVER, ET AL.,
vs.
JAMES G. AND HARVEY W. BROWN.

122 To Theodore M. Davis, receiver, &c., plaintiff in above-entitled cause:

Please take notice, that upon the trial of this cause we shall offer in evidence and prove as a deference thereto, the following facts, namely:

That on December 2d, 1869, the defendants in this suit, being indebted to the Ocean National Bank of the city of New York in the sum of eighteen thousand eight hundred (18,800) dollars, gave to said bank their promissory note, dated December 2nd, 1869, signed D. Brown and Sons, and payable two months after date thereof, to the order of A. C. Rand, for the sum of eighteen thousand eight hundred (18,800) dollars, and delivered the same, so made and endorsed by the said A. C. Rand, to the said Ocean National Bank of New York; that on June 17th, 1870, one George E. McOmber, being indebted to these defendants in a large sum of money, executed and delivered to them thirty-five promissory notes for the sum of five hundred (500) dollars, each signed by the said Geor. E. McOmber, and all payable at the office of Citizens' Gas-Light Co., of Saratoga Springs, New York, from time to time
123 thereafter, the time of payment of said notes running from thirty to sixty-five months after the date thereof respectively, and all of said notes being payable to the order of said George E. McOmber, and endorsed by him in blank. Said notes were secured to be paid by stock of the Citizens' Gas-Light Company of Saratoga Springs, New York, which said stock was deposited in the Commercial National Bank of Saratoga, New York, as collateral security for the payment of said notes; that said stock, so deposited in said bank for the securing of said notes, was estimated to be worth twenty-five per cent. more than the value of all the notes of said McOmber, so held by these defendants; and said stock was so held by said Commercial National Bank as collateral security for the payment of said McOmber notes at the time of the transfer of said notes to the said Ocean National Bank, hereinafter referred to.

That subsequently, and on the 9th day of June, 1871, these defendants, so being the owners and holders of said notes so executed and secured by said McOmber as aforesaid, and also being indebted to
124 the Ocean National Bank of New York upon said note above mentioned, so given to said bank by these defendants as aforesaid, entered into negotiations with the said Ocean National Bank, through its then president, Columbus S. Stevenson, for the purpose of paying and satisfying said note for eighteen thousand eight hundred (18,800) dollars, above mentioned; and it was then and there agreed by and between the said Stevenson, as president of said Ocean National Bank, and these defendants, that if these defendants would pay to said bank the sum of three thousand three hundred and fifty-four (3,354) dollars in money, and turn over to said bank enough of said McOmber notes, so belonging to these defendants, to pay said eighteen thousand eight

hundred (18,800) dollar note, together with such interest as had accrued thereon up to that date, less the sum of fifteen hundred (1,500) dollars, that it, the said bank, would receive said sum of three thousand three hundred and fifty-four (3,354) dollars and said McOmber notes in full payment and satisfaction for said note of eighteen thousand eight
125 hundred (18,800) dollars and the indebtedness secured thereby.

That, in making this agreement, nothing had been said about these defendants endorsing said McOmber notes, but it had been assumed, on the part of said Ocean National Bank, that these defendants intended to endorse the same. After the draft for the sum of three thousand three hundred and fifty-four (3,354) dollars, hereinafter mentioned, had been drawn, the subject of endorsing said McOmber notes by these defendants came up, and these defendants refused to endorse the same; and thereupon said Stevenson refused to carry out said agreement unless these defendants would endorse said McOmber notes so to be transferred to said Ocean National Bank. The matter was then further discussed between said Stevenson and these defendants, and it was then and there agreed that these defendants should pay the said Ocean National Bank the further sum of fifteen hundred (1,500) dollars, and endorse said notes as a matter of form merely, in order that they might appear all regular and formal to the bank examiner and others;
126 but it was expressly understood and agreed that said Ocean National Bank should not hold these defendants liable on such endorsements, but would forever save and keep these defendants harmless thereupon, said endorsements being made merely as a matter of form, as above mentioned, and not with the intent or purpose of holding these defendants liable as endorsers thereof.

That thereupon these defendants drew a draft for said further sum of fifteen hundred (1,500) dollars, and delivered the same, together with the one for three thousand three hundred and fifty-four, (3,354,) to said Stevenson, payable to the order of the Ocean National Bank, and upon the Merchants' Savings, Loan and Trust Company of Chicago, Illinois, and delivered said drafts to said Ocean National Bank, which were afterwards duly honored and paid; and the McOmber notes above mentioned, so given to the said Ocean National Bank for the balance of the amount due on said eighteen thousand eight hundred (18,800) dollars note, within a week or ten days thereafter were forwarded by these
127 defendants from Chicago to said Ocean National Bank, endorsed in pursuance of said agreement, said McOmber notes, at the time said agreement was made, being in Chicago, the then home of these defendants, and not in New York, where this transaction occurred.

That the notes sought to be recovered in this suit are portion' of the McOmber notes so turned over to the Ocean National Bank in payment of said note of eighteen thousand eight hundred (18,800) dollars, as hereinbefore stated, and none other.

That the said Ocean National Bank held said McOmber notes up to the date of their bankruptcy, which occurred some time in the early part of the year 1872; that, upon such bankruptcy or insolvency, the plaintiff in this suit, Theodore M. Davis, was appointed receiver for such Ocean National Bank, and prosecuted this suit as the receiver of said bank; that said notes have never been transferrrd by the Ocean National Bank, but are now owned and held by said bank, or said Davis, as the receiver for said bank, and not otherwise; and that these
128 defendants are not liable, either as endorsers, guarantees, or otherwise on said notes, or either of them, for the reason that it was expressly agreed by and between said Ocean National Bank and

these defendants that these defendants should not be so liable at the time the same were so endorsed and transferred to said Ocean National Bank.

WALKER, DEXTER AND SMITH,
Attys. for Defendants.

(Endorsed:) Filed Feb'y 28, 1874. Wm. H. Bradley, clk.

And afterwards, to wit, on the 16th day of March, A. D. 1874, a stipulation made by the parties, by their attorneys, in said entitled cause, was filed in said clerk's office, which said stipulation is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said northern district of Illinois.

THEODORE M. DAVIS, RECEIVER OF THE
129 Ocean National Bank of the city of
New York,
vs.
HARVEY W. BROWN AND JAMES G. BROWN.

It is hereby stipulated by and between the parties to the above-entitled cause that the maker of the ten promissory notes sued on in said cause resided at the time of the making of said notes and ever since has resided, and still resides, in the State of New York; and that said notes were duly presented for payment at maturity to the maker thereof and at the place of payment; and that the same were duly protested for non-payment, and notice thereof duly given to said defendants; and that said notes were made and were made payable in said State of New York, and all signatures to or endorsed on said notes are admitted to be genuine.

That proof of all the matters & things set forth in the notice filed with the general issue in said case may be given in evidence the same as though they had been set forth in special pleas filed in said case and with the same effect.

130 The endorsement of the notes in question was nominally written in the State of Illinois, but the question whether the contract of endorsement was made in Illinois & whether it is to be deemed an Illinois endorsement, is to be open to proof by either party on the trial.

March 10, 1874.

MILLER & FROST, *Attys. for Plff.*
WALKER, DEXTER & SMITH.

(Endorsed:) Filed March 16, 1874. Wm. H. Bradley, clk.

And afterwards, to wit, on the 19th day of May, A. D. 1874, a stipulation made by the parties, by their attorneys, was filed in said-entitled cause in said clerk's office, which said stipulation is in the words and figures following, to wit:

Circuit court U. S., N. D. Ills.

THEODORE M. DAVIS, RECEIVER,
v.
JAS. G. BROWN ET AL.

131 It is hereby stipulated in this case that a jury trial be waived, & that the case be submitted to the court to be tried by the court without a jury.

WALKER, DEXTER & SMITH,
Attys. for Defts.

MLLLER & FROST,
Attys. for Plff.

(Endorsed:) Filed May 19, 1874. Wm. H. Bradley, clk.

And afterwards, to wit, on the 7th day of July, in the July term, A. D. 1874, in the record of the proceedings of said court in said entitled cause appears the following entry, to wit:

THEODORE M. DAVIS, RECEIVER, &C.,
vs.
HARVEY W. BROWN ET AL. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined by agreement of the parties by their attorneys, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves
132 upon the court, and after hearing the evidence and the arguments of counsel the court takes the same under advisement.

And afterwards, to wit, on the 31st day of July, in the July term, A. D. 1874, in the record of the proceedings of said court in said-entitled cause is the following entry, to wit:

THEODORE M. DAVIS, RECEIVER OF THE Ocean National Bank of the City of New York,
v.
JAMES G. BROWN AND HARVEY W. BROWN. } Assumpsit.

This cause having been submitted to the court for trial without the intervention of a jury, the court, after hearing and considering the evidence, finds the following facts: 1st. That defendants, at the time stated in the declaration, endorsed in blank and delivered to the Ocean National Bank of New York City the notes sued upon in this case, and that said notes were duly protested for non-payment, and defts. duly notified thereof. That at the time of making said endorsement,
133 and as a part of the same transaction, the president of said bank, Columbus S. Stevenson, executed, for and in behalf of said bank, and delivered to defendants, a contract in writing that defendants should not be liable to said bank as such endorsers, and agreeing that defendants should not be sued thereon by said bank. 2d. That the said president of said bank had authority to make said special agreement that defendant should not be liable as such endorsers. 3d. That at the March term of this court, 1873, said plaintiff brought a suit against defendants on their endorsement of two notes of the same tenor

and date as those involved in this suit, except that they fell due at an earlier day, which notes were part of the lot of notes turned over and endorsed by defendants to the bank at the time said agreement not to hold defendants liable on said endorsements was made, and were included in said agreements and a part of the same transaction. That defendants, under the advice of counsel learned in the law, defended said suit in good faith under the plea of the general issue
134 solely upon the ground that their liability had not been fixed as endorsers by due prosecution of the maker of said notes as required by laws of Illinois to fix the liability of endorsers. That this defence was not sustained by said court for the reason that it appeared that the maker of said notes resided in the State of New York and the contract of endorsement was made in said State of New York and governed thereby. And judgment was rendered for the plaintiff for the amount due on said notes and costs, the said special agreement not to hold defendants liable as endorsers not having been pleaded nor relied upon in said suit. 4th. The court also finds that said Ocean Bank was a National Bank, and that plaintiff was duly appointed receiver thereof, and was acting as such at the commencement of this suit. Wherefore the court finds that defendants are not liable in this action. It is thereupon considered and adjudged by the court that the defendants do have and recover of and from the said plaintiff the costs and charges accrued herein, taxed at thirty dollars and thirty cents, and that execution issue therefor.

135 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, northern district of Illinois.

THEODORE M. DAVIS, RECEIVER OF THE OCEAN National Bank of the City of New York, *vs.* HARVEY W. BROWN AND JAMES G. BROWN. } Bill of exceptions.

Be it known that the above-entitled cause was tried by the court at the July term of said court, A. D. 1874, a jury having been waived by a stipulation signed by the attorneys of the respective parties and duly filed in said cause, and that, to maintain the issues on his part, the plaintiff gave in evidence a promissory note, of which the follow-
136 ing is a copy:

"SARATOGA SPRINGS, *June* 17, 1870.

"Thirty-two months after date I promise to pay to the order of myself five hundred dollars at the office of Citizens' Gas-Light Company, value received, with interest.

(Signed) "G. E. MCOMBER.

(And endorsed:) "G. E. McOmber, H. W. Brown, J. G. Brown."

Also nine other promissory notes of like amount respectively made, signed, and endorsed as above, payable respectively in thirty-three to forty-one months, inclusive, from the date above mentioned.

It was admitted in behalf of the defendants that said notes had been duly presented for payment; that they were protested for non-payment and due notice thereof given to the defendants. Evidence was also given of the due appointment of the plaintiff as receiver of said Ocean National Bank.

In the progress of said trial the following question was put in behalf of the defendants to the witness Alonzo C. Rand:

Were you present at a conversation between the defendants and the said Stevenson, (meaning Columbus S. Stevenson, president of
137 the Ocean National Bank,) at the Gilsey House, in New York, at any time after the two conversations above enquired about, and relating to the indebtedness above mentioned, (meaning the indebtedness of D. Brown & Sons to said Ocean National Bank,) on the notes in suit? If *you*, state when such interview occurred, who was present, and all that was said by defendants, or either of them, and said Stevenson, with regard to such settlement.

To which question counsel for the plaintiff then and there objected on the ground that the evidence therein called for was incompetent. The court overruled said objection, to which ruling and decision of the court counsel for the plaintiff then and there excepted, and the witness answered said question as follows:

I was present in the office of the Gilsey House about a week after the first interview referred to in interrogatory number six. It was in June, 1871, when C. S. Stevenson, H. W. Brown, and myself were conversing on matters in general. Don't remember who else was present. H. W. Brown said that he had paid up the note of the Ocean National Bank on which I was endorser; that he, Brown, had agreed to give the bank the McOmber notes. I asked Brown if he was to endorse the notes. He said
138 he was as a mere matter of form. Yes, said Stevenson, he is only to endorse them as a matter of form, but is not to be held responsible.

Counsel for the plaintiffs then and there duly objected to said answer of said witness on the ground that the same was incompetent and the legal effect of the endorsement could not be varied by parol, but the defendants by his attorney stated that they expected to prove that said agreement was in writing; that the writing was destroyed by accident. The court overruled said objection and received said answer as evidence tending to prove the substance of said agreement, to which ruling and decision of the court counsel for the plaintiff then and there duly excepted.

In the progress of said trial the defendants called as a witness the defendant Harvey W. Brown, to prove the defense set up in the notice attached to the plea filed in behalf of the defendants in said cause, to wit, that at the time said defendants endorsed said notes and delivered the same so endorsed to the Ocean National Bank it was agreed as part of said transaction by and between said defendants and said Ocean National Bank, by Columbus S. Stevenson, as president of said bank,
139 that said defendants should not, by reason of such endorsements, be held liable as endorsers or guarantors upon said notes, and that they should be treated as not having incurred any pecuniary liability by reason of such endorsement, and that such agreement restricting said defendants' liability was in writing.

Counsel for the plaintiff thereupon duly objected to the competency of said witness to give said testimony, for the reason that said promissory notes were commercial paper and the said witness was a party upon said paper, and could not be heard in a court of justice to impeach or dis-

credit the same, or show that his liability was not such as was imported by said indorsement upon said paper, and that said evidence was itself incompetent.

The court overruled said objection and the witness was permitted to testify.

To which ruling and decision of the court counsel for the plaintiff then and there duly excepted.

Said witness thereupon testified in said cause and gave testimony tending to show that about the 7th of June, 1871, the said Ocean
140 National Bank held the promissory note of D. Brown & Sons, (of which firm defendants were members,) dated Dec. 21, 1869, and payable two months after date to the order of A. C. Rand, and endorsed by said Rand, for the sum of about $18,800; that on the 7th of June, 1871, the defendants held thirty-five promissory notes of *of* George McOmber for five hundred dollars each, and payable respectively in thirty to sixty-five months from date, inclusive, to his own order, and endorsed by said McOmber; that on the 9th of June, 1871, it was agreed by and between said defendants and said bank, by said Stevenson, as president of said bank, that said bank would receive from said defendants in satisfaction of said note of D. Brown and Sons, then held by said bank, the sum of $3,354 in cash, and enough of said McComber's notes, so held by said defendant, to make up in amount with the said sum of $3,354 the amount then due upon the note of D. Brown and Sons, less the sum $1,500, and drew their draft for said sum of $3,354; that said Stevenson, as president of said bank, requested defendants to endorse said notes, but
141 that defendants refused to become endorsers upon said notes, and thereupon it was further agreed by and between said bank, by Stevenson, as president, and said defendants, that if said defendants would pay said fifteen hundred dollars and endorse said McOmber notes said endorsement should be regarded and treated as a mere matter of form and said defendants should not be regarded or treated as having contracted any personal liability by making such endorsement, and that no suit should be brought or maintained against defendants as such indorsers; and thereupon said defendants gave to said Stevenson, as president of said Ocean National Bank, their two drafts upon a bank in the city of Chicago, one for $3,354 and the other for $1,500, and then and there endorsed a sufficient number of said McOmber notes to make up the balance due upon the said notes of D. Brown and Sons and delivered the same so endorsed to said Stevenson, as president of said bank, and the said Stevenson, as president as aforesaid, thereupon then and there delivered up to said defendants said note so made by D. Brown and Sons, together with an agreement in writing upon a
142 separate paper, signed by himself, as such president, and addressed to J. G. & H. W. Brown, stating in substance that they had that day endorsed the said McOmber notes to said bank in settlement of said note of D. Brown & Sons, and that in consideration of said settlement and $1,500 the bank would not hold them, the said H. W. & J. G. Brown, liable upon their endorsement of said McOmber notes or sue them thereon; that said promissory notes given in evidence in behalf of the plaintiff were a part of said McOmber notes so endorsed and delivered as aforesaid and referred to in said written agreement, and that said agreement was destroyed with other papers of defendants by the great fire in Chicago on the 9th of October, 1871, without the fault or procurement of defts.

The above testimony was duly objected to by the counsel for the plaintiff in the progress of said trial upon the ground aforesaid, and

also for the reason that said testimony was incompetent and immaterial; said objection was overruled by the court, and said testimony received as evidence in the case, to which ruling and decision of the court in overruling said objection counsel for the plaintiff then and there duly excepted.

143 It also appears from the evidence, and the court so found, that among the said McOmber notes so endorsed by the said defendants, and delivered to the said Ocean National Bank, were two promissory notes for $500 each, one payable thirty months after date, and the other payable thirty-one months after date, which were endorsed by the said defendants and delivered to said Stevenson as president of said bank, together with the notes now in suit as a part of one and the same transaction, and that the said plaintiff commenced suit on the said two notes in said circuit court of the United States for the northern district of Illinois against the defendant as endorsers on said notes on the thirtieth day of January, A. D. 1873, for the then succeeding March term of said court, and the defendants were duly served with process in said cause, and duly appeared and answered the declaration filed therein by filing the plea of the general issue thereto on the 30th of April, 1873; that a stipulation, signed by the attorneys of the respective parties, was filed therein on the 30th of April, 1873, waiving a jury and submitting said cause to the court for trial. That the only defence relied upon at said trial was that plaintiff had not brought suit in

144 apt time against the maker of said notes, so as to fix the liability of the defendants as endorsers under the statute of Illinois, although the makers of the said notes did not reside in said State of Illinois when said notes fell due, and said endorsement thereof was not made in said State.

That thereupon said judgment was rendered by said court in favor of said plaintiff and against said defendants in said suit for the amount due on said notes. And it further appeared in evidence, and the court found as a fact, that defendants were advised by counsel learned in the law, that the said defence, so set up and relied upon by them to said suit, was a valid and sufficient defence to said action, and that defendants need not make or rely upon any other defence; and that defend'ts made said defence in good faith, relying upon said advice of counsel.

Counsel for the plaintiff, in the progress of the trial of this case, asked and requested the court to rule that said defendant', by reason of said recovery in said former suit, were estopped from raising the defence sought to be raised in this suit, to wit, that at the time said

145 defendants endorsed said notes it was agreed by and between said Stevenson, for and in behalf of said Ocean National Bank, and said defendants, that said defendants should not be held or treated as pecuniarily liable by reason of such endorsements, but the court overruled said request, to which ruling of the court counsel for the plaintiff then and there duly excepted. Defendants also introduced other testimony tending to corroborate the matters testified to by said Brown & Rand, and also tending to show that said Stevenson had authority, as president of said bank, to make said contract exempting defendants from liability on said endorsement.

Said witness, H. W. Brown, further stated that in the course of said transaction, and prior to the endorsement of said notes by said defendants, said Stevenson stated to said defendants that he desired said defendants to endorse said notes in order that they might appear all regular and formal to the bank-examiner, and there was no evidence that any one interested in said bank other than the said Stevenson,

knew of the existence of said agreement that said defendants
146 should not be held liable on said endorsements. Counsel for complainants thereupon and in the course of said trial asked the court to rule and hold that if the facts testified to by said Brown, as hereinbefore set forth, were true, then defendants were liable to said bank upon their said endorsements notwithstanding such agreement; but the court refused to so rule and hold; to which ruling and decision of the court counsel for the plaintiff then and there excepted.

And the court having been requested to make a special finding of the facts in said case did thereupon, before the entry of judgment in this case, find the following facts:

Circuit court of the United States for the northern district of Illinois.

FRIDAY, *July* 31st, *A. D.* 1874.

Present the Hon. Henry W. Blodgett, judge.

DAVIS, RECEIVER, &c.,
vs.
JAMES G. BROWN AND HARVEY W. BROWN.

147 This cause having been submitted to the court for trial without the intervention of a jury, the court, after hearing and considering the evidence, finds the following facts:

1st. That defendants, at the time stated in the declaration, endorsed in blank and delivered to the Ocean National Bank of New York City, the notes sued upon in this case, and that said notes were duly protested for non-payment, and defendants duly notified thereof; that at the time of making such endorsement, and as part of the same transaction, the president of said bank, Columbus S. Stevenson, executed for and in behalf of said bank, and delivered to defendants, a contract in writing that defendants should not be liable to said bank as such endorsers, and agreeing that defts. should not be sued thereon by said bank.

2nd. That the said president of said bank had authority to make said special agreement that defendants should not be liable as such indorsers.

3rd. That at the March term of this court, 1873, said plaintiff brought a suit against defendants on their endorsement of two notes of the same tenor and date as those involved in this suit, except that they fell
148 due at an earlier day, which notes were part of the lot of notes turned over and endorsed by defendants to the bank at the time said agreement not to hold defendants liable on said endorsements was made, and were included in said agreement and a part of the same transaction; that defendants, under the advice of counsel learned in the law, defended said suit in good faith, under a plea of the general issue, solely upon the ground that their liability had not been fixed as endorsers by due prosecution of the maker of said notes as required by the laws of Illinois, to fix the liability of endorsers. That this defence was not sustained by said court for the reason that it appeared that the maker of said notes resided in the State of New York and the contract of endorsement was made in said State of New York & governed thereby, and judgment was rendered for the plaintiff for the amount due on said notes and costs, the said special agreement not to hold defendants liable as endorsers not having been pleaded nor relied upon in said suit.

149 4th. The court also finds that said Ocean Bank was a national bank, and that plff. was duly appointed receiver thereof and was acting as such at the commencement of this suit.

Wherefore the court finds that defts. are not liable in this action.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed July 31st, 1874. Wm. H. Bradley, clk.

And afterwards, to wit, on the 28th day of September, A. D. 1874, said plaintiff, by his attorneys, filed in said clerk's office his supersedeas bond in said entitled cause, which said bond is in the words and figures following, to wit:

Supersedeas bond.

Supreme Court of the United States.

THEODORE M. DAVIS, RECEIVER OF THE OCEAN National Bank of the city of New York,
vs.
HARVEY W. BROWN AND JAMES G. BROWN.

150 Know all men by these presents that we, Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, of the city and State of New York, and Henry G. Miller & Thomas G. Frost, of the county of Cook and State of Illinois, are held and firmly bound unto Harvey W. Brown and James G. Brown, of the city of Chicago, in the county of Cook and State of Illinois, in the sum of five hundred dollars, to be paid to the said Harvey W. Brown and James G. Brown, their executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this seventeenth day of September, A. D. 1874.

Whereas the above-named Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois. Now, therefore, the
151 condition of this obligation is such that if the above-named Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THEO. M. DAVIS, [SEAL.]
As Receiver of the Ocean National Bank of the City of New York.
HENRY G. MILLER. [SEAL.]
T. G. FROST. [SEAL.]

Sealed and delivered in presence of—
J. W. TROTT.

Approved:
H. D. BLODGETT, *Judge.*

(Endorsed:) Filed September 28th, 1874. Wm. H. Bradley, clerk.

152 NORTHERN DISTRICT OF ILLINOIS, *ss :*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said entitled cause, wherein said Theodore M. Davis, &c., is plaintiff, and said James G. Brown et al. are defendants, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in Chicago in said district, this 10th day of October, A. D. 1874, and of our Independence the 99th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

153 UNITED STATES OF AMERICA, *ss :*

The United States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the circuit court before you, between Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, plaintiff, and Harvey W. Brown and James G. Brown, defendants, a manifest error hath happened, to the great damage of the said Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
154 with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this fifth day of August, A. D. eighteen hundred and seventy-four.

[SEAL.] WM. H. BRADLEY,
Clerk of the United States for the Northern District of Illinois.

(Indorsed:) Circuit Court U. S. nor. dist. Ills. Theodore M. Davis, receiver, &c., vs. James G. Brown et al. Writ of error.

155 UNITED STATES OF AMERICA, *ss:*

To Harvey W. Brown and James G. Brown, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Chief-Justice of the said Supreme Court of the United States this 26th day of Sept., in the year of our Lord one
156 thousand eight hundred and seventy-four.

H. W. BLODGETT, *Judge.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Due service of a copy of the above and foregoing citation accepted by us this 30th day of Sept., 1874.

WALKER, DEXTER & SMITH,
Attorneys for Harvey W. Brown & James G. Brown.

(Indorsed:) 460. United States circuit court. T. M. Davis, receiver, &c., v. H. W. Brown et al. Citation.

(Indorsement on cover:) No. 192. Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, plaintiff in error, vs. Harvey W. Brown & James G. Brown. N. Illinois, C. C. U. S. Filed 19th October, 1874.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1876.

No. 192.

THEODORE M. DAVIS,
Receiver of the Ocean National Bank of the City of New York,
Plaintiff in Error,

—vs.—

HARVEY W. BROWN and JAMES G. BROWN,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument on Behalf of Plaintiff in Error.

MILLER & FROST, Attorneys for Plaintiffs in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1876.

No. 192.

THEODORE M. DAVIS,
Receiver of the Ocean National Bank of the City of New York,
Plaintiff in Error,

—*vs.*—

HARVEY W. BROWN and JAMES G. BROWN,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF CASE.

On the 28th of November, 1873, Theodore M. Davis, Receiver of the Ocean National Bank of New York, commenced a suit against the appellees H. W. and J. G. Brown in the Circuit Court of the United States for the Northern District of Illinois, and in the declaration filed on the 3d of December, 1873, alleges that on the 17th day of June, 1870, one G. E. McOmber, at Saratoga Springs, New York, made his promissory note, bearing date on that day, wherein he promised to pay to his own order, at the office of the Citizens' Gas Light Company, two months after the date thereof, the sum of five hundred dollars, and then

and there endorsed the same to said defendants, and the defendants to whom said note was so endorsed and made payable, then and there endorsed said note by the name and style of H. W. Brown and J. G. Brown, and then and there delivered the same to the plaintiff, and thereby ordered and appointed the money in the note mentioned to be paid to the plaintiff; that the note was presented for payment at the office of the Citizens' Gas Light Company, at maturity, and not paid, and was duly protested for non-payment, and notice given to the defendants, whereof, &c. The declaration also contained similar counts on nine other promissory notes, each of a like amount, of the same date, and payable in thirty-three to forty-one months inclusive. The declaration also avers that interest for the forbearance of money, under the laws of New York, was at the rate of seven per cent. per annum. The declaration also contains the common counts.

The defendants appeared and filed their plea of the general issue February 28th, 1874, and appended thereto a notice that the defense would prove on the trial of said suit, and as a defense thereto, that on December 2d, 1869, the defendants were indebted to the Ocean National Bank in the sum of $18,800, and gave to said bank their note for that amount, signed by D. Brown & Sons, payable two months after date, to the order of A. C. Rand, and endorsed by said Rand; that on June 17th, 1870, they held thirty-five notes for $500 each, signed by George E. McOmber, payable at the office of the Citizens' Gas Light Company, at Saratoga Springs, New York, monthly, from thirty to sixty-five months after the date thereof, respectively, and all payable to the order of George E. McOmber and endorsed by him; and that stock of this Gas Light Company had been deposited in the Commercial National Bank of Saratoga as collateral security for the payment of these notes; that on the 9th of June, 1871, defendants entered into negotiations with the Ocean National Bank, through

Columbus S. Stephenson, its President, and it was agreed by and between Stephenson, as President of said bank, and the defendants, that defendants would pay to the bank $3,354 in cash, and turn over enough of said McOmber notes to pay said $18,800 note, together with interest that had accrued up to that date, less the sum of $1,500, and said bank would receive said notes and said sum of $3,354, in full payment and satisfaction of said note for $18,800; that in making this agreement nothing had been said about defendants' endorsing said McOmber notes, it having been assumed on the part of the bank that defendants intended to endorse them; that in consummating said agreement defendants refused to endorse said notes, and Stephenson refused to proceed further; and it was finally agreed that defendants should pay said bank $1,500, and endorse said notes as a matter of form merely, in order that they might appear all regular and formal to the Bank Examiner and others; but it was expressly understood and agreed that the bank should not hold defendants liable on such endorsements, but would forever keep and save defendants harmless thereon; and that defendants, under and in pursuance of this agreement, endorsed and delivered said notes to the bank; that the notes in suit now are a portion of the notes so endorsed; that the bank held them up to the date of its bankruptcy, which occurred early in 1872, and that upon the bankruptcy or insolvency of the bank, plaintiff was appointed its receiver, and that plaintiff prosecutes this suit as such receiver.

On the 16th of March, 1874, a stipulation signed by the attorneys of the respective parties was filed in said cause to the effect that the maker of the notes sued on at the time they were made, resided and has since continued to reside, and still resides in the State of New York; that at the maturity thereof they were duly presented for payment to the maker, at the place of payment, and that they were duly protested for non-payment, and notice thereof duly given

to the defendants, and that said notes were made and were made payable in the State of New York, and that defendants' signature as endorsers thereon were genuine. The casewas tried by Judge Blodgett, on the 7th of July, 1874; a stipulation waiving a jury signed by the attorneys of the parties having been filed.

The plaintiffs put in evidence the notes sued on and it was admitted in behalf of the defendants that they were duly presented for payment and protested for non-payment, and that due notice thereof had been given to defendants. Evidence was also given of the due appointment of the plaintiff as receiver of the Ocean National Bank The defendants put upon the stand Alonzo C. Rand, as a witness, and asked him the following question: "Were you "present at a conversation between the defendants and "the said Stevenson," (meaning Columbus S. Stevenson, President of the Ocean National Bank,) "at the Gilsey "House in New York, at any time after the two conver- "sations above enquired about and relating to the indebt- "edness above mentioned," (meaning the indebtedness of said Brown and Sons to said Ocean National Bank) "on "the notes in suit? If yea, state when such interview "occurred; who was present, and all that was said by the "defendants." The plaintiff, by his counsel, duly objected to this evidence, on the ground that the evidence therein called for was incompetent. The Court overruled the objection and directed the witness to answer the question, to which ruling and decision of the court, counsel for plaintiff then and there duly excepted and the witness answered as follows:

"I was present in the office ot the Gilsey House about "a week after the first interview referred to in interroga- "tory number six. It was in June, 1871, when C. S. Ste- "venson, H. W. Brown and myself were conversing on "matters in general. Don't remember who else was "present. H. W. Brown said that he had paid up the note

" of the Ocean National Bank on which I was endorser;
" that he, Brown, had agreed to give the bank the McOmber
" notes. I asked Brown if he was to endorse the notes.
" He said he was as a mere matter of form. Yes, said
" Stevenson, he is only to endorse them as a matter of form,
" but is not to be held responsible." Counsel for the plaintiff duly objected to the testimony, on the ground that the same was incompetent, and on the further ground that the legal effect of defendants' endorsement could not be varied by parol. Defendant's counsel then stated that said agreement was in writing, and that the writing was accidentally destroyed. The Court overruled said objection and received said evidence as testimony to prove said agreement, to which ruling and decision of the Court counsel for plaintiff then and there duly excepted.

Counsel for the defendant thereupon put upon the stand the defendant, Harvey W. Brown, as a witness to prove the defense set up in the notice attached to defendant's plea. Counsel for plaintiff thereupon duly objected to the competency of said witness to give said testimony, for the reason that said promissory notes were commercial paper and the said witness was a party upon said paper, and could not be heard in a court of justice to impeach or contradict the same, or show that his liability was not such as was imported by said indorsement upon said paper, and that said evidence was itself incompetent.

The Court overruled said objection, and said witness was permitted to testify, to which ruling and decision of the court, counsel for the plaintiff then and there duly excepted. Said witness thereupon testified in said cause, and gave testimony tending to show that about the 7th of June, 1871, said Ocean National Bank held the promissory note of D. Brown & Sons, (of which firm defendants were members) dated Dec. 21, 1869, and payable two months after date to the order of A. C. Rand, and endorsed by said Rand for the sum of $18,800; that on the 7th of June, 1871, the

defendants held thirty-five promissory notes of George McOmber of $500 each, and payable respectively in thirty to sixty-five months from date, inclusive, to his own order and endorsed by said McOmber; that on the 9th of June, 1871, it was agreed by and between said defendants and said bank by said Stevenson as president of said bank that said bank would receive from said defendants in satisfaction of said note of D. Brown & Sons, then held by said bank, the sum of $3,354 in cash, and enough of said McOmber notes so held by said defendants, to make up in connection with said sum of $3,354 the amount then due upon the note of D. Brown & Sons less the sum of $1,500, and that as said agreement was being consummated, said Stevenson as president of said bank requested defendants to indorse said notes, but defendants refused, and it was thereupon further agreed by and between the bank, by Stevenson, as its president, that if defendants would pay said $1,500, and endorse said McOmber notes, said endorsement should be regarded and treated as a mere matter of form, and said defendants should not be regarded or treated as having ever contracted any personal liability by making such endorsement; and upon this basis said agreement was consummated by the payment of said sums of $3,354 and $1,500, and the endorsing of said notes by said defendants; and said Stevenson as such president, reduced said agreement to writing signed by himself as such president, stating in substance that defendants had that day endorsed said McOmber notes to said bank in settlement of said note of D. Brown & Sons, and that in consideration of such settlement and $1,500, the bank would not hold them, the said H. W. & J. G. Brown liable upon their endorsement of said McOmber notes or sue them thereon; that defendants thereupon endorsed said McOmber notes, and delivered them to said Stevenson, and that said written agreement was lost in the Chicago fire in October, 1871.

The above testimony was duly objected to by counsel for

plaintiff, in the progress of the trial, upon the ground aforesaid, and also for the reason that the said testimony was incompetent and immaterial, but the court overruled said objection and received said testimony in the case, and plaintiff, by his counsel, duly excepted.

It further appeared from the evidence, that among the McOmber notes so endorsed were two notes of $500 each, payable in thirty and thirty-one months after date, upon which plaintiff brought suit in said court for the March term, 1873, against said defendants as endorsers.

That defendants duly appeared and filed a plea of the general issue in said suit, and that upon a trial by the court judgment was rendered in favor of the plaintiff and against the defendants, for the amount due upon said notes; and counsel for the plaintiff, in the progress of the trial, requested the court to rule that said defendants, by reason of said recovery in said former suit, were estopped from raising the defence sought to be raised in this suit, to wit, that said defendants endorsed said notes, under said special agreement with said Stevenson, that they should not be held liable upon said endorsements; but the court denied said request, and plaintiff's counsel excepted.

Said witness, H. W. Brown, further stated that in the course of said transaction, and prior to the endorsement of said notes by said defendants, said Stevenson stated to said defendants that he desired said defendants to endorse said notes in order that they might appear all regular and formal to the bank examiner, and there was no evidence that any one interested in said bank, other than the said Stevenson, knew of the existence of said agreement that said defendants should not be held liable on said endorsements. Counsel for the plaintiff asked the Court to rule that if these facts were so, then defendants were liable upon the endorsement, notwithstanding the agreement with Stevenson that they should not be liable, but the court refused to

so rule, and counsel for the plaintiff excepted. The court, upon request, made a special finding:

1st. That defendants, as stated in the declaration, endorsed and delivered to the Ocean National Bank the notes sued on; that they were duly protested for non-payment, and notice thereof given to the defendants; that at the time of making said endorsement, and as a part of said transaction, the president of the bank, Columbus S. Stevenson, executed for and in behalf of the bank, and delivered to defendants a contract in writing that defendants should not be liable to the bank as such endorsers, and agreeing that defendants should not be sued thereon by said bank.

2d. That the president had authority to make said special agreement.

3d. That at the March term of this court, 1873, plaintiff brought suit against defendants on the endorsement of the first two of said McOmber notes which were included in said agreement, and a part of the same transaction. That defendants defended said suit under the plea of the general issue, and under the advice of counsel, solely upon the ground that their liability had not been fixed as endorsers by the prosecution of the maker, as required by the laws of Illinois; the special agreement not to hold defendants liable as endorsers not having been pleaded nor relied upon in said suits.

4th. That the Ocean Bank was a national bank, and that plaintiff had been duly appointed its receiver.

5th. That the defendants were not liable.

Judgment upon this finding was entered for the defendants, and the case has been brought by the plaintiff, by writ of error, to this Court.

And he assigns the following errors:

1. The court erred in overruling plaintiff's objection to the testimony of Alonzo C. Rand, and in receiving said testimony as evidence in the cause.

2. The court erred in overruling plaintiff's objection to the testimony of Harvey W. Brown and to the competency of said Brown, as a witness, to give said testimony, and in receiving said evidence as testimony in said cause.

3. The court erred in refusing to rule that the defendants were estopped from setting up the defense contained in the notice attached to their plea of the general issue, by reason of the recovery against them in the former suit upon the first two of the notes included in said alleged agreement.

4. The court erred in finding for the defendants, and in rendering a judgment in said cause in favor of said defendants, and in refusing to find and render a judgment in favor of the complainants in said suit for the amount due upon said notes.

ARGUMENT.

I.

The Court below erred in overruling plaintiff's objection to the testimony of Alonzo C. Rand, on printed record, page 46.

Witness stated that he was present at the Gilsey House, in New York, in June, 1871, where a conversation took place between himself, C. S. Stevenson, and H. W. Brown, with reference to the endorsement of the Browns upon the McOmber notes. He says: "H. W. Brown "said that he had paid up the note of the Ocean National "Bank, on which I was endorser; that he, Brown, had "agreed to give the bank the McOmber notes. I asked "Brown if he was to endorse the notes. He said he was "as a mere matter of form. Yes, said Stevenson, he is "only to endorse them as a mere matter of form, but is "not to be held responsible." This conversation is not in relation to the contents of any written agreement which

had been executed and afterwards lost. Indeed, no written agreement had then been made; for this written agreement according to the testimony of H. W. Brown (see page 47 of Record), was not made until *after* the McOmber notes had been endorsed and delivered to Stevenson, and Stevenson had surrendered up the note of D. Brown & Sons; and the agreement, according to the testimony of Brown, recited that the McOmber notes had been endorsed by H. W. and J. G. Brown; while the parties in this conversation were speaking of notes that were *thereafter* to be endorsed, and the conversation was introduced to show what the agreement was before it had been reduced to writing. The testimony was, therefore, incompetent, upon two grounds :

1. The only competent evidence of a written agreement is the writing itself, or secondary evidence of its contents, when it is shown to have been lost; for between the time when this conversation took place, and when the written agreement was executed, the terms of it may have been changed.

2. The conversation amounts to a mere verbal admission of the president of the bank, that the Browns were not to be held liable upon the endorsement.

Parol evidence tending to show that there was an agreement between the parties that the defendants should not be held liable as endorsers, is inadmissible, for the reason that it is an attempt to destroy by parol, the legal effect of the endorsement.

That this testimony is incompetent has been settled by repeated decisions of this court. In *Bank of U. S.* v. *Dunn*, 6 Peters, 51, the endorser had been admitted as a witness, in the court below, to prove that by an agreement between the parties, including the person to whom the note was transferred, he was to incur no liability by his endorsement. The Court (page 59), says: "The facts "stated by the witness Carr, are in direct contradiction to

" the obligations implied from the endorsement of the re-
" spondent. By his endorsement he promised to pay the
" note at maturity, if the owner should fail to pay it. The
" only condition on which this promise was made was,
" that a demand should be made of the drawer when the
" note should become due, and notice given to the defendant
" of its dishonor. But the facts stated by the witness would
" tend to show that no such promise was made. Does not
" this contradict the instrument? And would not the
" precedent tend to shake, if not destroy the value of
" commercial paper? On this ground alone the exception
" would be fatal."

In *Brown* v. *Wiley et al.*, 20 How., 442, it was held that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn, calculated to vary the terms of the instrument, was not admissible.

In *Master* v. *Burton*, 54 Ills., 354, Court say: " It is
" further insisted in behalf of appellant, that he should
" have been permitted to prove a verbal agreement, made at
" the time of the endorsement, to the effect that he should
" not be responsible as endorser. This evidence was
" properly excluded. His assignment of the notes meant
" that in certain contingencies defined by the statute, he
" would pay the notes, and it meant this as fully as if this
" agreement had been written out in words. This was the
" legal effect of the assignment, and it cannot be impaired
" by proof of a different parol agreement. *Howes* v.
" *Merrill*, 5 Cush., 82; *Campbell* v. *Robbins*, 29 Ind., 271.

" This point has been often ruled, and so far as the cases
" cited by counsel for appellant tend to show such evi-
" dence admissible, they are in conflict with principles as
" well as the great current of authorities." This evidence was expressly decided to be incompetent in *Davis* v. *Randall*, 115 Mass., 547.

This testimony was received in support of the facts set forth in the notice attached to defendant's plea. The

plaintiff gave testimony tending to show that no such agreement was ever made, and if this testimony of defendant's was improperly received, the case should be reversed.

II.

Harvey W. Brown was not a competent witness to impeach his own endorsement of these notes. He and James Brown endorsed them, and delivered them to the bank, in order that it might appear to the directors, and any person interested in the bank, other than the president, that they had contracted the liability of endorsers. An endorser of a negotiable promissory note cannot swear away the legal obligations assumed by the contract of endorsement, inasmuch as public policy forbids that parties to commercial paper, and who have given it countenance and circulation, should be allowed to impeach it. The reason for his exclusion, does not lie in the fact that he is interested, for whether interested or not, he cannot testify, his name appearing as a party upon the paper, provided it is commercial paper, excludes him. Nor, does the propriety of his exclusion depend upon the question whether *bona fide* purchasers are to be affected, for they cannot be affected by such testimony from any quarter whether the witnesses who testify to defeat a recovery upon the paper, are parties to it or not. That is another principle altogether. The rule is one which applies to a party to commercial paper, and to him alone, and rests upon grounds of commercial security and public policy.

The leading case in this Court upon this question is *Bank* v. *Dunn*, 6 Peters, 51. In that case, the Court, at page 59, say: "The note in question was first endorsed "by the defendant to Carr, and by him negotiated with "the bank. It was discounted on the credit of the names "endorsed upon the note. This is the legal presumption

" that arises from the transaction; and if the first endorser " were permitted to prove that there was a secret under- " standing between himself and his assignees that he " should not be held responsible for the payment of the " note, would it not seriously affect the credit of this de- " scription of paper? Might it not, in many cases, oper- " ate as a fraud upon subsequent endorsers? The liability " of parties to a bill of exchange, or promissory note, has " been fixed on certain principles, which are essential to " the credit and circulation of paper. These principles " originated in the convenience of commercial transactions, " and cannot be departed from." At page 57, the Court say: " The doctrine of this case has since been uniformly ad- " hered to, and it is the settled law of this court.

Bank of Metropolis v. *Jones*, 8 Peters, 14.
Henderson v. *Henderson*, 3 How., 73.
Smythe v. *Stanton*, 4 How., 404.
Saltmarsh v. *Tuthill*, 13 How., 229.

It is entirely unnecessary to give decisions of our State courts. They are collected in a note in 1 Greenleaf's Ev., Redfield's Ed., p. 431.

Even if such a written release, as testified to by Brown, had been executed, it was clearly void, for the following reasons:

1. The president of the bank had no power to execute such a release.

It is true that the Judge, in his special findings, finds, as one of the facts in the case, " that the said president of " said bank had authority to make said special agreement " that defendants should not be liable as such endorsers; " but in his bill of exceptions, he says: " There was no evi- " dence that any one interested in said bank, other than " the said Stevenson, knew of the existence of said agree- " ment that defendant should not be held liable on said en- " dorsements." Here, then, is a distinct statement in the

record that this special finding is unsupported by any evidence whatever, unless the authority of Stevenson was an incident to his office as president of the bank. There was in fact no evidence upon the subject. It was not pretended that he had consulted with the directors of the bank, or that they, or any persons interested in the bank, had any reason to suppose that the endorsements of the Browns upon these notes were not precisely what they purported to be.

The power to discount paper by national banks is by the act of Congress vested in the Board of Directors, and in all incorporated banks it is usually vested in such a board. It was not even within the ordinary power of a cashier or president.

In the case of the *Bank of U. S.* v. *Dunn*, 6 Peters, 51, where the endorser endeavored to escape liability under just such an agreement as this, the court say, at page 60: "All " discounts were made under the authority of the directors, " and it is for them to fix any conditions that may be " proper for loaning money. If, therefore, the evidence " were clear of other legal objections, it would not have the " effect to release the defendant from liability. The as- " surances relied on, if made, were not made by persons " authorized to make them. The bank is not bound by " them; nor would it be bound if the assurances had been " made in so specific and direct a manner as to create a per- " sonal responsibility on the part of the cashier and presi- " dent."

So also in *Bank of Metropolis* v. *Jones*, 8 Peters, 12, a similar case, the court say: " As the ground already " stated is clear, it is unnecessary to add in this case, as " was stated by the court in the case of Dunn, that the " officers of the bank had no authority, as agents of the " bank, to bind it by the assurances which they gave."

In case of insurance and other corporations, where agents have solicited stock, and made representations and

conditions upon which subscriptions to stock have been based, but which do not appear on subscriptions or certificates of stock, it has been held by an almost unbroken line of decisions that such conditions and private agreements in no way affect the corporation, or the rights of creditors of the corporation. The fact that an agent is vested with power to solicit stock, does not carry with it, by implication any power to make representations as to the condition of the company, or the liability of the subscriber, but the subscriber will be held liable precisely as though no representation, condition, or other private agreement upon the subject, had been made; and a recovery can be had in favor of the corporation, or its assignee, entirely irrespective of any such conditional arrangements.

The following extracts from the opinion of the court in the case of *Bank* v. *Haskell*, 51 N. H., 121, 122, illustrates and sustains the general rule of law touching the authority of the cashier and president, for which we contend:

"The acts of a cashier done in the ordinary course of "the business actually confided to such an officer, may be "regarded *prima facie*, as coming within the scope of his "duty. He is held out to the public as having authority "to act according to the general usage, practice, and "course of businesss of such institutions; he is the finan-"cial officer of the bank. *City Bank* v. *Perkins*, 29 N. "Y., (2 Tiffany) 554. He is usually entrusted with all the "funds of the bank, in cash, notes, bills, and other choses "in action, to be used, from time to time, for the ordinary "and extraordinary exigencies of the bank; he receives "directly, and through subordinate officers, all moneys "and notes; he delivers up all discounted notes, and other "securities, when payments have been made; he draws "checks from time to time for moneys, whenever the bank "has deposits. In short, he is considered the executive "officer, through whom and by whom the whole moneyed "operations of the bank, in paying or receiving debts, or

"discharging and transferring securities, are to be con-
"ducted. This is the doctrine of *Fleckner* v. *The Bank of*
"*the United States*, 8 Wheat., 360, and it is fully recog-
"nized in *Corser* v. *Paul*, 41 N. H., 27; and is so laid
"down in Story on Agency, Sec. 114, and Angell and
"Ames on Corp., 295, 297.

"So he may issue certificates of deposit, transfer by en-
"dorsement the negotiable paper belonging to the bank or
"left with it for collection, and receive payment of dues to
"the bank and give receipts therefor. Angell and Ames
"on Corp., 296, 297 and cases cited. Story on Agency,
"Sec. 115. *City Bank* v. *Perkins*, 29 N. Y., 554; *Bank*
"v. *Wheeler*, 21 Ind., 90; *Wild* v. *Bank of Passamaquoddy*,
"3 Mason, 505; *Robb* v. *Ross Co. Bank*, 41 Barb., 586;
"*Sturges* v. *Bank of Circleville*, 11 Ohio, N. S., 153, hold-
"ing that a cashier, on selling a bill of exchange, may bind
"the bank by his affirmations.

"It is laid down, however, in Story on Agency, Sec.
"115, that the cashier of a bank has no incidental author-
"ity to make any declarations binding upon the bank in
"matters not within the scope of his ordinary duties, as,
"for example, by assuring a person about to endorse a
"note offered for discount, that he will incur no risk and
"no responsibility by becoming an indorser, and such is the
"doctrine of *United States* v. *Dunn*, 6 Peters, 51; *Bank of*
"*Metropolis* v. *Jones*, 8 Peters, 12.

"In both of these cases there appears to have been
"pledged property of the principal, and in the first case the
"court say that all discounts are made under the authority
"of the directors, and it is for them to fix the conditions
"which may be proper in loaning the money.

"In *Savings Bank* v. *Downing*, 16 N. H., 188, it was
"held that the treasurer could not bind the bank by a
"promise to notify the sureties of any failure to pay on se-
"curities furnished by the principal.

"So in *Bank* v. *Rogers*, 18 N. H., 225, 261, it was held

"that declarations of two directors and the cashier, that "the note in suit was given for a certain other note sup- "posed to be invalid, were not admissible, not being made "in discharge of any duty imposed on them, but a mere "narrative of a past occurrence.

"So, a promise by a cashier to pay a forged note, pur- "porting to be issued by the bank, is not within the scope "of his authority, and does not bind the bank. *Salem* "*Bank* v. *Gloucester Bank*, 17 Mass., 29. Though if he "had actually paid it, the money could not be recovered "back, because the cashier has an implied authority to de- "cide on the genuineness of the signatures. Angell and "Ames on Corp., 296, 297, and cases cited. The treas- "urer of a savings bank cannot release a debt of the "bank without special authority. *Dedham Institution, &c.* "v. *Slack*, 6 Cush., 408.

"In *Olney* v. *Chadsey*, 7 R. I., 224, it was held that the "President of a bank has no power *virtute officio*, to give "up to a debtor securities held by the bank against him. "In view of these principles and authorities, we think the "cashier of a bank has ordinarily no power to discharge a "debtor of the bank without payment, or to bind the bank "by an agreement that a surety should not be called upon "to pay a note he had signed, or that he would have no "further trouble from it. At least, we cannot say that as "matter of law, he has such authority."

51 N. H., 121, 122.

III.

There was, we submit, no consideration for the release of the endorsers in this case.

Brown says (see page 47 printed record), that the agreement in the first place was, that they should pay to the bank $3,354 in money, and deliver to the bank enough of the McOmber notes to make up the amount of the note

of D. Brown & Sons, principal and interest, upon which they were liable as makers, less $1,500; that when this arrangement was being consummated, they were asked to endorse the notes, and refused to do so. That it was then agreed that they should endorse the notes in the usual way, pay the bank the $1,500, and Stevenson should execute to them a private agreement, to the effect that they should not be held liable upon the endorsement. In other words, as a consideration for this collateral release of liability, they were to pay to the bank $1,500, the balance of the indebtedness to the bank. The payment of this $1,500 was simply the fulfillment of an obligation already resting upon them, and cannot be treated as a consideration for the argeement to release them. This release was therefore, a *nudum pactum*.

Hansborough v. *Peck*, 5 Wal., 497.

IV.

This agreement, if ever made, was a secret one between the president of the bank and the defendants, made for the express purpose, known to the defendants, of deceiving parties interested in the bank and its creditors, and was therefore void.

The law under which national banks are organized, was framed with a view to secure the creditors of these institutions, and it is to promote this end that it provides for the appointment of officers known as bank examiners.

Brown stated (see page 48 of printed record), "That "in the course of said transaction, and prior to the "endorsement of said notes by said defendants, said "Stevenson stated to said defendants, that he desired said "defendants to endorse said notes, in order that they "might appear all regular and formal to the bank "examiner, and there was no evidence that any one "interested in said bank, other than the said Stevenson,

"knew of the existence of said agreement, that said "defendants should not be held liable upon said endorse- "ments."

Here the defendants were distinctly told that the object of their endorsing the paper in the usual way, was to lead the officer, namely, the bank examiner, who was acting officially in the interest of the creditors of the bank, to suppose that the payment of the notes was secured by this endorsement, and the pretended release was a secret agreement to be used by the defendants, in case an attempt should be made to enforce the endorsement. It requires no authority to show that such an agreement is against public policy, and void. We asked the Court to so hold, but he refused, and this is one of the errors assigned.

In *Custer* v. *Titusville Gas & W. Co.*, 63 Penn. St. Rep., p. 381,

Court say: "Hence, when the representations of the "agent are contrary to the interest and duty of the cor- "poration as that he will release, or has authority to "release the subscription he is taking, it is not a reason- "able presumption that he has such authority, and a sub- "scriber on such terms would be *particeps criminis*, and "held to all the responsibilities of a *bona fide* subscriber."

This was expressly held in

Robinson v. *Pittsburgh & Connellsville R. Co.*, 32 Penn. St. Rep., p. 334.

V.

A final and conclusive answer to this whole defence is that it is *res adjudicata*, and the defendants were estopped from making it in this suit. It appeared in the case that the notes sued on were a portion of the 35 notes issued at the same time, and that this plaintiff brought an action upon two of the McOmber notes, which the defendants

endorsed and delivered to the bank at the time they endorsed and delivered the notes in this suit, and that the alleged agreement to release embraced these two notes, and would have constituted as valid a defense to the action upon them as to the present action. That suit was brought in the same court for the March term, 1873, the parties to it were the same, and the present defendants were there sued as endorsers of these two notes. The defendants in that case filed the plea of the general issue. A jury was formally waived, and that case, as this, was tried by the court. Under that plea the defendants could have set up this release, but they chose, under the advice of counsel, to place their defense upon another ground. Judgment was rendered for the plaintiff in that case, and that judgment was introduced as a bar to the defense in this case. But the court refused to so regard it, and this ruling of the court is assigned as one of the errors.

In *Henderson* v. *Henderson*, 3 Hare, 115, the Vice-Chancellor said: "In trying this question, I believe I state "the rule of court correctly that when a given matter "becomes the subject of litigation in and of adjudication "by a court of competent jurisdiction, the court requires "the parties to bring forward their whole case, and will "not, except ander special circumstances, permit the same "parties to open the same subject of litigation in respect "of a matter which might have been brought forward as "a part of the subject in controversy, but which was not "brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of "the case. The plea of *res adjudicata* applies, except in "special cases, not only to the points upon which the court "was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly "belonged to the subject of litigation, and which the "parties exercising reasonable diligence, might have "brought forward at the time."

In *Beloit* v. *Morgan*, 7 Wal., 619, this Court says: "A party "can no more split defences than indivisible demands, and "present them by piecemeal in successive suits growing "out of the same transactions." * * * "But the "principle reaches further. It extends not only to the "questions of fact and of law which were decided in the "former suit, but also to the grounds of recovery or "defence which might have been, but which were not "presented."

The point is again distinctly decided in the same way by this Court in *Gould* v. *Evansville R. R. Co.*, 1 Otto, 526, 533.

In *Embury* v. *Conner*, 3 Comst., 522, the Court say: "That the judgment or decree of a court possessing com- "petent jurisdiction is, as a general rule, final not only as "to the subject matter thereby actually determined, but "as to every other matter which the parties might litigate "in the cause, and which they might have had decided, "can admit of no doubt," citing numerous cases.

In *Castle* v. *Noyes*, 14 N. Y. (4 Kernan), 329, where the *bona fides* of a mortgage and the title of the plaintiff by virtue thereof to the property in dispute were the questions involved, and which had been previously decided in a justice's court, the Court of Appeals held the justice's judgment to be conclusive between the same parties, and lay down the rule in the following language in their opinion: "It is well settled that the judgment of a court "of competent jurisdiction is conclusive in a second suit "between the parties or persons, although the subject "matter may be different. (*Doty* v. *Brown*, 4 Comst., 71.) "In this view it is immaterial that the *bona fides* of the "mortgage was not passed upon or decided by the justice. "The judgment may nevertheless be alleged by way of "estoppel against the claim of title in the defendants."

It is also held in Illinois, in the case of *Hamilton* v.

Quimby, 46 Ills., 90, that a former adjudication is conclusive, between the same parties in a subsequent proceeding upon the same matter not only as to the matters actually determined, but as to every other thing then within the knowledge of the party, which might have been set up as ground for relief, and litigated in the last suit.

See also *Babcock* v. *Camp*, 12 Ohio, 11.

Numerous other cases might be cited to the same effect, but we think it is unnecessary to discuss this point further.

The rule in regard to pleading an estoppel is as follows. In many authorities it is laid down unqualifiedly that it is immaterial whether the estoppel is strictly pleaded or (when introduced by the defendant) it is proven under the general issue. The prior judgment is equally conclusive in either case.

Young v. *Runnell*, 2 Hill, 478.
Miller v. *Maurice*, 6 Hill, 115.

All the authorities agree that when the estoppel cannot be strictly pleaded, it is absolutely conclusive between the parties when introduced in evidence. In this case the defense relied on was set up in a notice attached to the plea of general issue; to this no replication could be made. The plaintiff was not, therefore, in a situation where he could plead this estoppel. Hence, under all the authorities, when introduced in evidence, it becomes absolutely conclusive.

The court below declined to give it this effect, for the reason that the defendants in the former case were advised by counsel that they would certainly succeed upon the defence they did set up in that case, and that it was unnecessary for them to make any other defence—a very singular reason, and it would be remarkable if an adjudicated case could be found pronouncing it invalid, but it has been so pronounced.

The fact that a party has been wrongfully advised with reference to his mode of defence, cannot be urged against the conclusiveness of the record of that suit when introduced into a suit subsequently brought.

Davis v. *Talcott*, 12 N. Y. (2 Kern.), 189.

MILLER & FROST,

Plaintiff's Attorneys.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1876.

No. 192.

THEODORE M. DAVIS,

RECEIVER OF THE OCEAN NATIONAL BANK OF THE CITY OF NEW YORK,

PLAINTIFF IN ERROR,

—vs.—

HARVEY W. BROWN AND JAMES G. BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY.

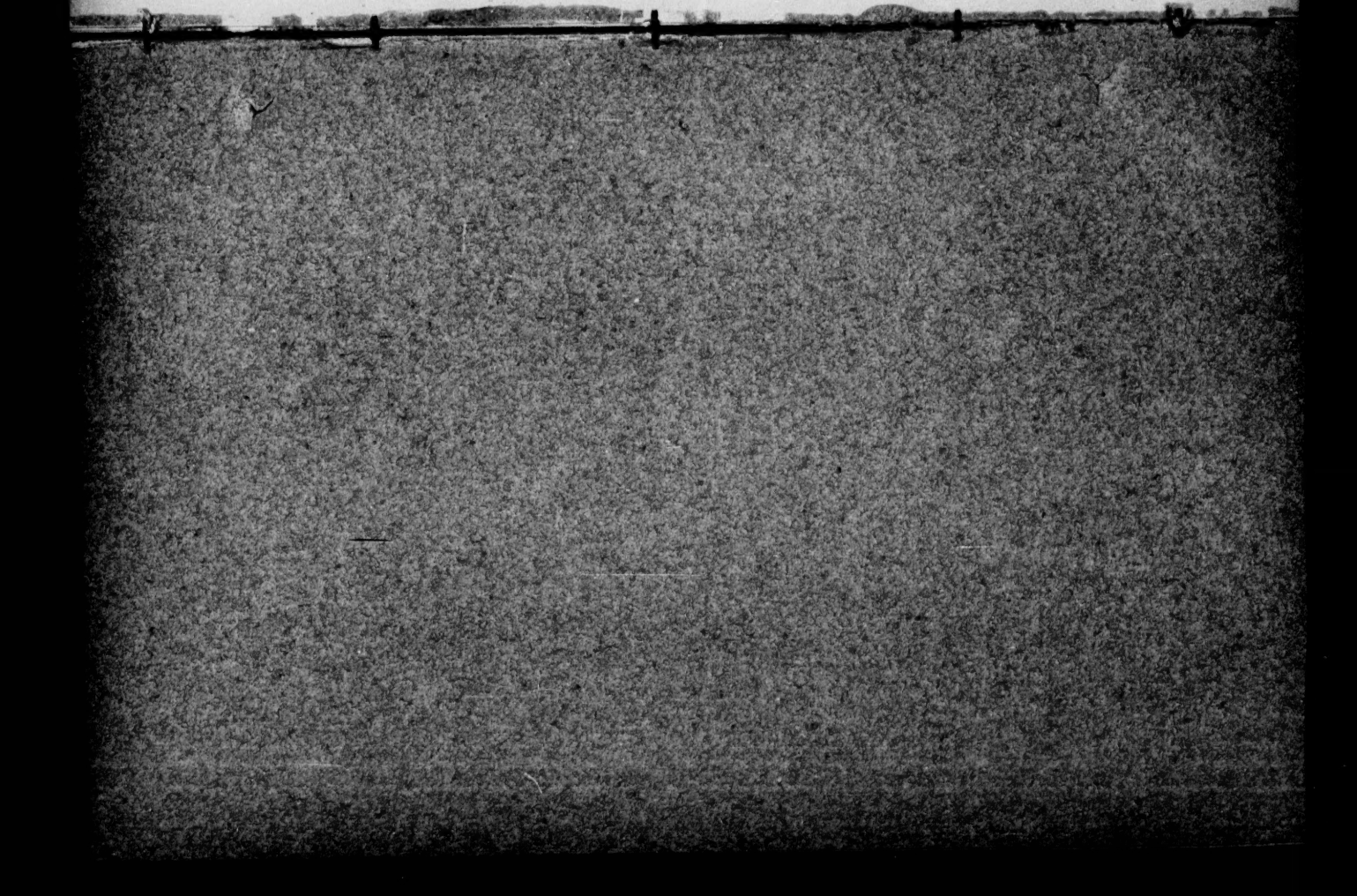
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CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.

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REPLY.

I.

It is insisted, on the part of the defendant in error, in reply to the objection made to the testimony of Alonzo C. Rand, to the effect that Brown, the endorser, had agreed to give the bank the McOmber notes (being the notes in suit), "that he was to *endorse them as a mere matter of "form, but was not to be held responsible for them*," that this evidence was offered to show the bare fact that the written agreement relied upon had been actually made, and that for such purpose only the Court received it, and the counsel, for confirmation of his position, refers to the

138th page of the original record—being the 48th page of the printed record. By reference to the record here referred to, we find the fact to be, as there stated, that the Court overruled the objection to this testimony of Rand, and " received said answer as *evidence tending to prove* " *the substance of said agreement.*" From this statement it seems clear that the evidence was offered and received for the purpose of showing the substance of the contract itself, the defendant's attorney stating in the same connection, that he " expected to prove that said agreement was " in writing, that the writing was destroyed by accident."

The evidence was not offered or received for the purpose of proving, as now contended, the fact of the execution of a written contract, or an admission that one had been executed. But, however this may be, the evidence was clearly inadmissible for either purpose. It was incompetent for the purpose of proving the fact that a written agreement had been executed, because it contains no statement by the witness that he ever saw the contract, or was present at the time of its execution, or that the parties admitted in his presence that it had been executed. On the contrary, the language used by the witness implies that the interview testified to by him, must have occurred prior to any written contract, and prior to the endorsement of the notes. The language is : " I asked Brown if he *was* to endorse " the notes. He said he *was*, as a mere matter of form. " ' Yes,' said Stevenson, ' he is to endorse them as a mere " ' matter of form, but is not to be held responsible.' "

There is in this testimony not the slightest intimation that the witness Rand had any knowledge of any written agreement between the parties on this subject, or that Stevenson admitted that he had executed a written agreement.

The testimony relates to a *future*, not a *past* transaction To notes that were *to be* delivered and endorsed, not to·

notes that had been endorsed, and the endorsement of which was made the subject of a written contract, changing the tenor and legal effect of the endorsement, as it appeared upon the back of the notes.

The incompetency of the testimony to show the contents of a written contract on the subject of the endorsement, is likewise apparent upon the face of the evidence. It does not profess to give the contents of any written paper whatever. If any such written agreement as claimed was ever executed, and the interview testified to by Rand occurred, it is obvious from the language used that the interview was prior to the execution of the written contract, and appertained to negotiations before its execution. It was precisely that kind of evidence which, had the contract been in writing, and there present, ready to be produced, would, according to the settled rules on this subject, have been wholly improper, as no cotemporaneous negotiations, or negotiations preceding or subsequent to the written agreement, can properly be introduced in evidence where there is a written contract in which all negotiations relating to the subject matter of the contract are, in contemplation of law, merged. The fact that the writing was destroyed by fire does not change the rule of law on this subject. The point to be determined is, after proof of the execution of the writing, what its contents were, to be ascertained by the recollection of the witness, not what was said before, or at the time of the execution.

The evidence offered not only did not bear upon the true and legitimate point of inquiry, but it introduced matters wholly foreign to the issue, and positively objectionable, as prior negotiations might lead a court or jury far astray if they were to be adopted as evidence of the written contract finally concluded between the parties. The contract itself is the only competent evidence on that subject. When the contract is destroyed, its sworn contents are the next

best evidence, and to that the testimony should properly be confined. Under the guise and promise of introducing a written contract, or proving its execution and its contents, resort cannot be had to testimony whose entire legal operation and effect is to show a verbal agreement to vary a written contract of endorsement, which cannot be legally varied by parol.

Nor does the testimony of Harvey W. Brown relieve the difficulty or obviate the error committed by the court in receiving the testimony of the witness Rand. The question of fact upon the trial was, whether such an agreement, as testified to by the defendant's witnesses, was ever made. That there was such an agreement was asserted on the one side and denied on the other, the witnesses on the respective sides were in necessary conflict on this question. How far the testimony of Rand operated upon the mind of the Court in inducing the conclusion which the Court reached upon the subject, it is impossible to say. The rule upon a bill of exceptions is, that if evidence is erroneously admitted which bears in the least degree upon the result, the judgment must be reversed.

II.

To the objection made to the testimony of Harvey W. Brown upon the ground that he was not a competent witness, to impeach his own endorsement of the notes in suit, it is urged by the counsel for the defendant in error, that "It is the paper signed by the bank president that modifies the endorsement, and not the defendant Brown, the witness." This is, however, a distinction without a difference. It is the testimony of the defendant Brown, the witness, that establishes the execution of the paper by the bank president which impeaches the endorsement. It is

his testimony, therefore, which impeaches the endorsement. It is vain to say, in the language of the counsel upon the other side, that "all he [the witness] does is to "account for the non-production of a writing signed by "the complainant, and having so done, to state its con-"tents." Brown, by his testimony, virtually impeaches the contract of endorsement, which the law implies from his name on the back of the note. He destroys his liability as endorser. He does it as effectually as it could be done in any way whatever. This, the policy of the law does not allow him to do. If the contract by which the liability of the endorser is sought to be defeated was *verbal*, instead of being in writing, precisely the same argument might be used. It might then be said with the same degree of plausibility as now: It is the *agreement* which discharges the endorser, not the *testimony* of the *witness*. The answer, however, is plain. It is the testimony of the witness that proves the agreement, and it is the testimony of the witness, therefore, that releases his own liability as endorser.

It is immaterial how many links there are in the chain, or what number of facts are required to establish the conclusion of the release of the endorser. After all said and done, it is the testimony of the witness which accomplishes the result which the law declares cannot be accomplished by his testimony. It was in fact precisely such a contract as this in substance and effect, which, it was held in the case of *Bank* v. *Dunn*, 6 Peters, 51, and *Bank of Metropolis* v. *Jones*, 8 Peters, 14, could not be established by the testimony of the endorser.

In the first case named the endorser was called to prove a statement and understanding and agreement that his liability as endorser should be merely nominal.

And it was held that the endorser was not a competent witness for this purpose, upon the ground of public policy,

the Court stating that, "It is a well settled principle that "no man who is a party to a negotiable note shall be per- "mitted by his own testimony to invalidate it."

The endorser who testified was not a party to the suit, and his exclusion as a witness was placed solely upon the ground that it was contrary to public policy, as tending seriously to affect the credit of commercial paper.

Precisely the same argument as is made here in favor of the admissibility of the testimony was made in that case, as appears from the following citation from the language of the Court, on page 58, namely: "On the part of the "defendant's cou sel it is contended that between parties "and privies to an instrument not under seal, a want of "consideration, in whole or in part, may be shown. * * "That if an assurance were given at the time of the en- "dorsement, that the names of the defendant and Carr "were only required as a matter of form, and that a guar- "anty had been given for the payment of the note so as to "save the endorsers from responsibility, it may be proved "under the rule which permits the promissor to go into "the consideration of a note or bill between the original "parties."

The Court, however, held otherwise, and the judgment of the court below was reversed for the error committed in the reception of this evidence.

So in the other case of the *Bank of the Metropolis* v. *Jones*, 8 Peters, 12, it was held that the maker of a note was not a competent witness to prove that the endorsee informed the endorser he would incur no responsibility by putting his name on the note.

Justice McLean, in giving the opinion of the Court, page 16, says: "If an individual whose name appears "upon the face of a negotiable instrument, either as "drawer, endorser or acceptor, shall be a competent

" witness to prove facts or circumstances, which lessen or " destroy its value before or at the time he gives it cur- " rency, the credit of commercial paper could not be sus- " tained."

The value of the paper in the case at bar is sought to be materially lessened, and the endorsement itself rendered absolutely nugatory by the testimony of Brown, the endorser.

In both of the cases just referred to the actions upon the respective notes were brought by the banks which discounted the paper, and by whose officers the assurance and guarantee were given that no personal responsibility should attach to the endorser by virtue of the endorsement, and not by a subsequent *bona fide* purchaser of the note, without notice and before maturity.

So also in the case of *Walters* v. *Witherell*, 43 Ills. Rep., page 389, a similar doctrine is held, and the Court use the following language in the opinion given, after citing from the opinion of Lord Mansfield in *Walton* v. *Shelley*, to the effect that it was " of consequence to mankind that no " person should hang out false colors to deceive them by " first affixing his signature to a paper, and then afterward " giving testimony to invalidate it," and discussing the contradictory cases in England. " The distinction sometimes " sought to be taken between cases where the endorse- " ment was made before, and those in which it was made " after maturity, seems to us without foundation, and " inconsistent with the reason of the rule. The endorser " lends the sanction of his name and faith as much by an " endorsement after as before maturity." In that case the endorser was called to prove simply that the consideration of the notes endorsed had failed, and it was held that he was not competent for this purpose. If this ruling is correct, then certainly the endorser can not be competent, as in the case at bar, to testify to an agreement which

virtually releases the contract of endorsement. The claim made on the other side that the endorser is simply called to prove the execution, and the contents of a distinct and independent paper, is obviously untenable, and is no answer to the objection, so long as the object and effect of proving this is simply and solely to defeat the apparent contract and liability of the endorser, as shown by the endorsement itself, which is absolute and unconditional.

The reasons of public policy against the testimony of the endorser in such case apply here with great force. The evidence shows that the agreement was a secret one between the president and the endorser. The language of the bill of exceptions upon page 48 of the printed record is "there was no evidence that any one interested in said "bank, other than the said Stevenson, knew of the exist-"ence of said agreement, that said defendants should not "be held liable on said endorsements," and the testimony of Brown is distinctly to the effect—at bottom of page 48, printed record—that said defendants were required "to "endorse said notes in order that they might appear all "regular and formal to the bank examiner," and an allegation to the same effect is contained in the notice of defence set up under the plea of the general issue, under which this evidence was introduced.

This being the avowed purpose of the arrangement and agreement by which the notes were to be endorsed, while at the same time the endorsers were to be released secretly from all liability upon their endorsement, the rule of public policy which excludes the endorser from thus invalidating the paper which he has endorsed applies here with peculiar force. The design and intent is to deceive a public officer, and to induce him to suppose that the endorsement is not only genuine, but absolute and unconditional, when it is in fact a mere nullity so far as any liability to be created thereby is concerned, an officer

whose special and peculiar duty it is to guard the interests of the public and of the creditors of the bank. If the rule can ever apply to any case under any circumstances, it certainly ought to be applied here, and the endorser should be excluded as a witness, and in fact the defendant should be estopped in any event, and by any testimony, from setting up such a defence.

Such an agreement as this is itself void, upon obvious grounds of public policy.

It is immoral, and in conflict with the law, and with the plain duty of the officers of the bank, and especially of the President, who had no right whether authorized by the Directors or not, to enter into an agreement to impose upon and deceive the Bank Examiner, and mislead him as to the true condition of the affairs of the bank. Any agreement of this kind, for such a purpose is in plain conflict with the requirements of the law, and with the duty of the officers of the bank, who are bound to deal fairly, truthfully and openly with the Bank Examiner. No contract necessarily involving a wrongful and illegal act, or purpose, can be available by way of defence, and to establish affirmatively a release of the endorser's liability. He is liable according to the terms of the endorsement, and the contract by which his liability, under such endorsement is sought to be discharged, is for the reason stated void, and of no effect; and the evidence offered was for this reason, as well as for the reason that the endorser was incompetent to prove it, wholly inadmissible. Where an illegal contract is entered into, and both parties are *in pari delicto*, neither party has a right to rely upon such contract to make out a cause of action on the one hand, or to defeat a cause of action on the other. The case must be decided as though no such immoral or illegal contract had been made. It must be laid wholly out of

view, for all purposes connected with the prosecution or defense of the suit.

Robinson v. *Pittsburgh and Connellsville R. R. Co.*, 32 Pa. St. Rep., p. 334.

Coster v. *Titusville Gas and W. Co.*, 63 Pa. St. Rep., p. 381.

Randall v. *Howard*, 2 Black, 588. This case holds that: "Neither party can enforce against the other a contract "made between themselves to injure a third person in "fraud of the law."

III.

To the position taken by the counsel for the plaintiff in error, that the defense sought to be set up to the action against the endorsers upon the notes in question is barred by a judgment in a prior suit against the defendants, upon a portion of this series of notes designated as the McOmber notes, and embraced in this agreement to release the endorsers, and where the same defense precisely might have been interposed, if valid, to the notes upon which a recovery was had, it is replied by the counsel for the defendant in error, that inasmuch as this defense was not in fact set up in the former suit, and was not passed upon by the Court, that the judgment in that case was no bar to the action in this suit. It is argued, from various authorities cited in the brief filed on the part of the defendants in error, which hold that where the record itself does not definitely disclose what the grounds of recovery were in the former suit, and what claims were embraced therein, it is admissible to show what the facts were by parol evidence, that if this is admissible, then it is clear that if the question involved in the second suit was not actually presented, and tried and decided in the

first suit, that the former suit could be no bar, as otherwise there would be no propriety in an examination outside of the record to ascertain what issue was in fact tried in the former suit.

That the authorities on this subject are not entirely uniform is frankly admitted; but that the conclusion contended for by the counsel on the other side is deducible from all the authorities cited by the counsel for the defendants in error, we entirely deny.

What we claim is, that the rule of decision adopted by this Court, and sustained by a vast number of authorities, necessarily estops the defendants in this case from setting up the defense sought to be interposed upon the trial below. That rule of estoppel is announced by this Court in the case of *Beloit* v. *Morgan*, 7 Wallace, 619, referred to in our original brief, in the following language: "The principle [of estoppel] reaches farther. It extends "not only to the questions of fact and of law which were "decided in the former suit, but also to the grounds of "recovery or defense which might have been, but which "were not presented.

This rule is re-affirmed by this Court in the case of *Gould* v. *Evansville R. R. Co.*, 1 Otto, p. 533, in the following language, namely: "Where every objection urged in the "second suit was open to the party within the legitimate "scope of the pleadings in the first suit, and might have been "presented in that trial, the matter must be considered as "having passed *in rem judicatam*, and the former judgment "in such case is conclusive between the parties;" and again, the Court say: "Except in special cases, the plea of *res* "*judicata* applies not only to points upon which the Court "was actually required to form an opinion and pronounce "judgment, but to every point which properly belonged "to the subject of the allegation, and which the parties,

" exercising reasonable diligence, might have brought for-
" ward at the time." The same rule is announced in the case of *Embury* v. *Conner*, 3d Comstock, N. Y. Rep., 522, and in various cases cited in our original brief.

It is by the rule *thus settled by this Court* upon the authority of various adjudged cases, as it is here claimed on the part of the plaintiff in error, that the defendants are estopped from setting up this defense. It is quite immaterial to inquire whether other courts in some of the cases cited by the counsel for the defendants in error may not have held a different rule. The question here is, whether defendants are barred of this defense *under the rule as laid down by this Court.* Under this rule the defendants are estopped not only from setting up a defense which was actually made, but also from setting up a defense which might have been made on the former trial. Under the general issue, which was interposed in the action of assumpsit upon the two notes embraced in the former suit, which was a part of the series of notes covered by this alleged agreement for release of the endorsers, it was admissible for the defendants to have proved, under the issue thus made, almost any facts in discharge of the action, such as payment, release, &c., and most clearly it was admissible to show that no right of action ever existed upon the endorsement against the defendants, and that they never incurred any liability thereby by reason of this cotemporaneous agreement by which they were to be held not liable as endorsers.

There was no difficulty whatever in the way of the defendants interposing this defense to the action upon the notes embraced in the former suit, had they chosen to have done so. The mere fact that parol evidence is admissible in many cases, in order to show the grounds of a judgment or recovery, proves nothing in favor of the position taken on the other side. There are many cases which recognize

as correct the rule for which we contend, in which it is held that such evidence is admissible. For instance, in case of a suit where the declaration was upon promissory notes, and upon the common counts for goods sold and delivered, money had and received upon an account stated, and for moneys due upon settlement, and where the record failed to show definitely upon what claims the recovery was had, it would be admissible to show that no recovery was had upon the notes whatever, and that no notes were introduced in evidence, and hence no defense could have been interposed to them, and that the recovery was had solely under the common counts, and for goods sold and delivered, or for other considerations having no connection with or reference to the notes. This was the extent of the ruling in the case of the *Washington Steam Packet Co.* v. *Sickles*, 5 Wall., 593, and same case, 24 How., 333, cited on the other side. In various other cases which might be mentioned, the introduction of parol evidence to show what was actually tried, may be admissible. This doctrine does not militate against the rule for which we contend; and even if some of the authorities cited on the other side did militate against this rule, while they may show a conflict of authority on the question, they cannot overthrow *the rule* thoroughly established and repeatedly re-affirmed by this Court, in accordance with the decisions of the courts of New York and of various other States where the rule, as interpreted by this Court, is clearly recognized. The authoritative determination of the question by this Court in previous adjudged cases must control.

The counsel for the defendant in error have, we submit, entirely misconceived the effect and meaning of the decision of this Court in the case of *The Washington Steam Packet Co.* v. *Sickles*, reported in 24 Howard, 333, and also in 5 Wallace, 580.

The decisions in both cases recognize the correctness of

the same rule laid down by this Court in the case of *Morgan* v. *Beloit*, 7 Wall., 622, and the same rule for which we contend, namely, that where the same questions are fairly involved in the case in the former suit as in the latter, the record is conclusive upon the parties in the second suit, and if the same defense was available in the first suit as in the second, and might have been presented by the defendant on the trial of the issue, the judgment against the defendant in the first suit is conclusive as to the sufficiency of the defence in the second suit. The parol evidence, which was held competent in the cases last cited, pertains simply to the identity of the cause of action or defense, and where various causes of action were set forth in different counts of the declaration, it was held competent to show by parol evidence on which count and for which cause of action the judgment was rendered.

The language of the Court in the opinion given in the first case, is:

"If the verdict had been rendered on the special count, "in exclusion of the others, the record itself would have "shown that the existence and validity of the contract "were in question. There would have been no ground "for the inquiry whether any other issue was presented "to the jury. But where a number of issues are pre-"sented, the finding on any one of which will warrant the "verdict and judgment, it is competent to show that the "finding was upon one rather than another of these differ-"ent issues."

So also in the same case, reported in the 5th Wallace, the Court say, on page 591:

"It was important to settle the terms of the contract "in evidence on the former trial, in order to determine "whether it is the same as the one then in controversy, "and resting in parol; these terms depended very much "upon the testimony in the case."

And again, on page 592, the Court say:

" It is quite clear that the record of the former trial, to-
" gether with the extrinsic proofs, fail to show that the
" contract in controversy in the present suit was neces-
" sarily determined in the former in behalf of the plain-
" tiffs. We agree, if the declaration had contained but
" the first count, which had set out the contract in contro-
" versy in the present suit, the effect of the judgment
" would have been different. The verdict of the jury,
" then, could not have taken place without finding the *ex-*
" *istence and validity of the contract.*"

It was for the refusal to allow parol evidence on this question, by the court below, that the judgment was reversed.

The dissenting opinion of Justice MILLER shows no dissent on his part from the judgment of the majority of the Court upon the point we are now discussing, as the following extract from the opinion, on page 596, shows, namely:

" If that testimony did show that the contract on which
" the verdict in the former suit was rendered was the one
" set up in the first count of the present declaration, then
" the record established both the making of that *contract*,
" *and its valid character*, *for a judgment* was rendered on
" that verdict, which is still in full force, and unreversed."

The point of difference between the view of Justice Miller and that of the majority of the Court is tersely expressed in the last clause of his opinion, on page 599, as follows:

" I am of opinion that there was but one question in the
" case, and that was whether the former verdict and judg-
" ment were based on the same contract counted on in the
" present suit, and that the evidence which went to the
" jury had a tendency to establish that fact, and the evi-

" dence rejected by the court had no tendency to disprove " it."

No question can arise here as to the identity of the defense sought to be set up here, and of the agreement relied upon to defeat a recovery with the defense and agreement applicable to the notes sued upon in the former suit. The identity is expressly found by the Court in its formal finding of the facts in the case, and the excuse for not establishing said defense in the former case by appropriate evidence, is found to be, that the defendants, acting upon the advice of counsel, were induced to suppose that they had another defense upon which they could rely, and which they regarded as fatal to a recovery. Whether the liability of the endorsers upon this series of notes, two of which were sued in the first case, and the residue in the case at bar, was under this agreement at the time of their transfer to the bank, actual and effective, or merely nominal, was necessarily involved in that case.

If that defense is good here, it was equally as good a defense to the notes in the first suit. If it was unavailable there, it is unavailable here. It was involved in the case, was admissible under the pleadings if valid, and whether evidence was introduced to sustain it or not, *the record was and inevitably must have been conclusive as to the liability of the endorsers, inasmuch as no recovery could have been had upon said notes against said defendants as endorsers, unless they were liable upon the notes in that capacity.*

It is not at all necessary to the legitimate application of the principle of estoppel in question, that the notes in the former suit, upon which judgment was rendered, should have been the same notes as those involved in the present case. If the same question was fairly embraced in the former suit, as in the second case, the judgment of the

Court in the former suit is conclusive, and binds both parties.

The case of *Beloit* v. *Morgan*, 7th Wall., 619, cited in our original brief, is decisive upon this point, and the case is in fact " on all fours " with the one at bar. The legislature of Wisconsin had authorized the supervisors of the town of Beloit to subscribe to the capital stock of a certain railroad company, and to pay for the same in the bonds of the town. The regularity and validity of the issue of these bonds became a matter of controversy between the holders of the bonds and the authorities of Beloit. Morgan, the plaintiff below in that case, first brought a suit at law for the interest of some of his bonds, and recovered judgment. Afterwards he brought other suits against the town on other of the bonds, not the same instruments on which he had obtained judgment, but part of the same issue. The town of Beloit thereupon filed a bill to enjoin the proceedings at law, and to compel a surrender of the bonds.

Morgan, the holder of the bonds, thereupon set up, amongst other defences, in his answer to the bill of injunction, by way of estoppel, the judgment, which he had recovered on certain of the bonds, as conclusive of the validity of the whole issue. The bill was dismissed by the Court below, and the judgment affirmed by this Court, the Court holding, amongst other things, that the former judgment upon the other bonds belonging to the same issue as those in suit was conclusive upon the parties in subsequent litigation concerning any portion of the bonds. The statement of the facts, so far as the question at bar is concerned, is fully comprehended in the following brief extract from the opinion, pp. 621, 622, viz : " On the 9th of January, 1861, the " appellee recovered a judgment at law upon another por- " tion of these securities, though not the same with those " in question in this case. The parties were identical, and " the title involved was the same. All the objections " taken in this case, might have been taken in that. The

" judgment of the Court could have been invoked upon " each of them, and, if it were adverse to the appellant, he " might have brought the decision here by writ of error " for review. The Court had full jurisdiction over the " parties and the subject. Under such circumstances, a " judgment is conclusive, not only as to the *res* of that " case, *but as to all further litigation between the same par-* " *ties touching the same subject matter, though the res itself* " *may be different.*"

It is impossible to distinguish the present case from that of *Beloit* v. *Morgan*. There is not a particle of difference between them. The question arose there in precisely the same shape as it arises here, and the same result must inevitably follow, and, as was said by the Court there, so it must be said here, that the rule of estoppel " extends not " only to the questions of fact and of law which were de- " cided in the former suit, but also to the grounds of " recovery, or defence, which might have been, but which " were not presented."

There is no room whatever for construction here as to the effect and meaning of that decision. The question raised here, was the very point in judgment there, and there is nothing in the previous decisions of this Court which militates against the decision in *Morgan* v. *Beloit*, or against the rule there established, and for which we contend in this case.

We insist, therefore, that upon this question, as well as upon the question of the admissibility of the testimony given by Rand and by Brown, we are fully fortified by the decisions of this Court in the cases cited, and the points here raised on the part of the plaintiff in error have been by this Court fully and repeatedly determined in our favor, and that the judgment in the Court below should be reversed, and the case remanded for a new trial.

MILLER & FROST,

Attorneys for Plaintiff in Error.

Supreme Court of the U. S.

October Term, 1876.

THEODORE M. DAVIS, Receiver of Oecean National Bank,
vs.
H. W. & J. G. BROWN.

No. 192.

ARGUMENT FOR DEFENDANTS.

U. P. SMITH AND STEPHEN SIBLEY,
COUNSEL FOR DEFENDANTS.

Supreme Court of the U. S.

October Term, 1876.

THEODORE M. DAVIS, Receiver of Oecean. National Bank,

vs.

H. W. & J. G. BROWN.

ARGUMENT FOR DEFENDANTS.

THE Bank held the note of D. Brown & Sons (of which firm Defendants were members), endorsed by one Rand, for $18,800. It agreed to take in satisfaction of this note, $3,354 cash, and $14.000 of the notes of one G. W. McOmber, well secured by pledge of Gas Stocks. By this agreement the Bank remitted $1,500 of the note of D. Brown & Sons, in consideration of getting McOmber's secured paper, and some cash down, in place of Brown's unsecured note.

In consummating this agreement a hitch occurred. The Bank wanted the Defendants to endorse the McOmber notes; but Defendants declined, claiming the bargain was, that the Bank should take the McOmber notes and collaterals, *in the*

stead of the Brown's paper. The difference was compromised by the Bank yielding the claim, and Defendants paying in cash the $1,500 the Bank had agreed to remit. In executing this agreement, Defendants endorsed the McOmber notes, and the Bank gave them a writing, stating they should not be sued on such endorsement, or held for the debt. The endorsement was merely to show the course of title, as "a matter of form" (Rec. 138 and 141). It was, in effect, as though Defendants had endorsed the notes "without recourse"; and there is not a shadow of evidence that the mode adopted for this exchange of paper defrauded or was intended to defraud any one.

The defence to this suit consists in abiding by this agreement.

I.

The 1st error assigned is to the question and answer of witness Rand found on page 136–7 of record. He is asked to state what occurred between Defendant H. W. Brown and the President of the Bank, just after the above settlement had been negotiated, and he states that Brown said he had paid the $18,800, note by the McOmber notes; and that the President said Brown incurred no personal liability by endorsing them.

We do not claim this evidence was competent to defeat the endorsement; nor was it offered for that purpose. The contract was in writing. That writing was destroyed in the Chicago fire. This evidence was offered to show the bare fact — the admission — that such an agreement had been made. And for such purpose the Court received it. (Rec. 138).

II.

The second error assigned is equally untenable. The Defendant, H. W. Brown, was objected to, as a witness, not competent, in law, to give testimony to impeach his own endorsement.

The material matter of Brown's evidence, is relative to the contents of a lost writing.

We might concede all claimed by counsel, as to the impolicy of permitting an endorser to swear away his endorsement.

But here it is the paper signed by the Bank President that modifies the endorsement. The Bank itself is the witness—it "impeaches the endorsement"—not the Defendant witness. All *he* does is to account for the non production of a writing signed by the Complainant, and having so done, to state its contents. Surely it will not be claimed he was not competent to do that.

Again; under this head, counsel say, the President had no power to sign such an agreement for the Bank.

But this Court cannot know that, for, the extent of power given by a corporation to any officer or other agent, is a matter of fact. The record says, p. 145, "Defendant also introduced *other testimony* tending to show that said Stevenson, *had* authority, as President of said Bank to make said contract." And this is entirely consistent with the other matter stated, viz. that no others interested in the Bank knew of the written agreement. He may have had abundant power from them, and yet they not know the fact of his exercise of it.

The third head of Plaintiff's agreement (under the second error assigned), is that such agreement was wlthout consideration.

Plainly not. By the contract, the Bank took other security in the place of Brown's note, for the debt.

Would counsel reverse *Cumber vs. Wane*, and more than all that follows it, in 1 Smith L. C. 439?

The Fourth point made is that such agreement was secrct, and made to deceive those interested, as creditors, &c., of the Bank, and so fraudulent and void.

The record does not show that any issue of fraud was made or tried. By the record, p. 146, it appears after the witness Brown testified, the plaintiff's counsel asked the Court to rule that, if true, still judgment should go for plaintiff. This was substantially a demurrer to the evidence of *one witness* in the case. The Court could not do otherwise than reject the application. No question of fraud was presented. The Court was not asked to, and did not find the fact to be that any fraud deceit or secrecy existed, in the transaction, and the question cannot be here asked.

We may add: The Bank was the interested party to collect its debt. It deemed it got a better security by the exchange than it had. In *substance*, it gained. In doing so, it desired to observe *formalities* satisfactory to the Examiner.

Again: The President wanted the endorsement by defendants. As a pretext he may have made the remark quoted, which really thwarted his design, by defendants yielding to it "in form," on receiving the separate qualifying writing.

III.

The third error assigned, is the refusal of the Court to estop Defendants, by a former recovery by plaintiff against Defendants on some of the series of notes so given to the Bank, though the issue tried here, was not presented or adjudged in the former case.

There were a number of the McOmber notes (Rec. 115). On the two first due, a prior suit was brought, and under the general issue, upon the advice of counsel, the Defendants relied solely on the defense, that, even as endorsers, they were not then liable to suit, because the endorsement was made in, and governed by the law of Illinois, where the endorser is not liable till the maker is exhausted, or proven insolvent; and that the maker had not been sued and was solvent, (Rec. 148.,

But the Court, after advisement, held the endorsement, though made in Illinois, (Rec. 130) first took effect, under the facts, in N. Y., and gave Plaintiff judgment.

The defense here made, was not there presented, (Rec. 148).

The plea here is also the general issue, supplemented with notice of special matter, under the State law which provides (Rev. Stat. 1874, p. 778, § 29. "The Defendant may plead as "many matters of fact in defense as he may deem necessary or "he may plead the general issue and give notice in writing, un- "der the same, of the special matter intended to be relied on for "a defense on the trial," and under which he may give evidence as though specially plead.

The plaintiff did not reply, nor even add the *similiter*.

The issue in the prior case was a narrow one, inexpensive

in its trial, largely of law, to wit: that under the admitted facts no present right of action existed. Here it was, whether the the implied contract of endorsement was so changed by contemporary express contract, as to defeat the action.

The rule established by judgment of this Court, in *The Washington Steam Packet Co. vs. Sickles*, 24 How., 333, is that in cases where the pleading is general—as the common counts in a declaration, and the general issue in defence—parol evidence is admissible to show the matter in fact litigated, and whereon the jndgment was rendered in the case put in evidence for an estoppel, and as to the matter so shown to have been tried and adjudged, the former recovery is conclusive; but it is no estoppel as to any other separate cause of action, or distinct matter of defence.

In the above case, the plaintiff sued for an instalment due, under contract, for use of a patented appliance. He had before recovered of the same defendant, a prior instalment due under the same contract. The defendant plead the general issue. The plaintiff introduced in evidence the former recovery, and objected to all evidence by defendant to show what issue was tried, and that the matter of defense offered to be proven was not presented in the first suit. The Court below sustained the objection, and this Court reversed that ruling, with this conclusion, (p. 346): "It is the opinion of the Court that the Circuit "Court erred in holding that the plaintiffs in error were es- "topped by the proceedings in the former suit from any inquiry "in respect to the matters in issue and *actually tried* in that "cause: and its judgment is reversed."

In the course of its judgment, at p. 344, this Court says: "The judgment rendered in that suit * * is conclusive of

"all the facts properly pleaded by the plaintiffs. But when it "is presented *as testimony* in another suit, the enquiry is com- "petent whether the *same issue has been tried and settled by it.*" And the Court cites approvingly, 5 Duer, 488, *Hughes vs. Alexander*, where a prior judgment by default between the same parties, on one of two notes, parts of the same transaction, was held not to be a bar; and after a review of cases, Judge Hoffman says, p. 493: "We do not find a case which makes a "former suit a bar, when it has been expressly limited to one "or two distinct contracts, like promissory notes, *although such* "*notes have arisen from the same transaction*, and where the "claim upon the note subsequently sued upon, was not the "subject of litigation."

And again in The Packet Co., case in 5 Wall., 580–592--5 this Court allowed the defense of the Statute of frauds to be made, and therefore ruled that evidence to show the contract was in parol (p. 584) was competent, notwithstanding the Plaintiff had recovered on a suit for a prior installment, and that recovery was offered as an estoppel to the defense. And because such parol evidence was refused below, the judgment was reversed; and the Court says that the parol evidence offered in relation to the former judgment, should be confined to showing, "the points in controversy on the former trial, to the "testimony given by the parties and to the questions submitted "to the jury for their consideration." p. 593; also, "the former "trial, therefore, when its conclusiveness must be submitted to "the jury, can be regarded only as a preliminary question and "*the merits independently of this question, should be heard and tried.*"

This Court did not intend, *Morgan vs. Beloit*, 7 Wall., 622,

to be construed as changing this rule, for in that case, in support of its decision it cites 3 Cow., 120, *Gardner vs. Buckbee*, where the pleading was general, and parol proof was given to show what was the question litigated; Judge Woodruff saying, (p. 127): "The record (of the "former trial)" shows that it was "competent, on the trial to establish the fraud of the Plaintiff. "Whether fraud was made out, and *whether that was the point* "*upon which the decision was founded, must necessarily be proved* "*by evidence extrinsic the record.*"

Judge Ruggles, in 4 Comst. p. 75, *Doty vs. Brown*, (also so cited by this Court) says: "Parol evidence was properly ad- "mitted to show what was *actually in controversy* between the "parties before Justice Tracy and the *ground on which his* "*judgment was rendered.*"

And Judge Brinkerhoof, in 12 Ohio St. p. 36, *Babcock vs. Camp.*, (also so cited by this Court) quotes from *Wood vs. Jackson*, 8 Wend., 10, "a former judgment may be given in "evidence accompanied by such parol proof as is necessary to "show the grounds upon which it proceeded, when such "grounds *from the form of the issue*, do not appear for the record itself."

Obviously parol proof of what was in fact tried in a former suit, would be inadmissible if the records were decisive, of any other questions than those in fact litigated.

There are cases, however, to which the language of Mr. Justice Swayne in *Morgan vs. Beloit* properly applies, viz: Cases where the pleadings set forth the facts on which the Plaintiff or Defendant rests; also cases where the object of the action is to secure a final accounting between the parties. The case of *Morgan vs. Beloit*, was in chancery and its pleadings neces-

sarily set forth in detail the cause and defense in the prior suit, and therefrom the reporter says: p. 620 the second suit "in-"volved the *same questions* as did the suit on those (bonds) on "which he had already recovered." The learned Justice quotes from *Henderson vs. Henderson*, 3 Hare, 115, where the first action was for *an account*, and the present was substantially a bill of review, and the Vice Chancellor well says, the former case *necessarily* involved the matter of the present bill, but he says, in conclusion, sustaining a demurrer to the bill, his decision might even here, have been otherwise, if the first case were not pending on appeal, where the errors complained of in this bill, might be heard, and if such, corrected.

And it is touching such cases, the learned Justice says the former recovery was conclusive "not only of the law and fact "which were decided in the former suit, but also of the grounds "of recovery or defense which might have been, but were not "presented." Because the very form and object of the action called for the adjudication of *all* matters of account between the parties.

So of the case of *Morgan vs. Beloit*. The defence to the former suit rested specifically upon the charge that the bonds were not valid, that the forms of proceeding for their legal issue had not been observed. And the court determined on that issue, that the conditions precedent had been observed, and the bonds were valid.

And it was this same defence which was set up in the bill, but with the additional support of some other alleged irregularity in the issue of the bonds, which might have been well enough offered in evidence in the first case, on the question of

compliance with the terms of the law essential to the validity of the bonds.

Counsel for plaintiff both below and here, put great stress upon the quoted clause in the opinion in *Morgan vs. Beloit*, and therefore we have ventured to recall the distinctions and rules applicable to the different classes of cases, though the subject has latterly been several times before this Court.

Indeed, any other rule than that observed by the Court below would shock the sense of justice.

Two small notes are defended on grounds quite similar to matter in present abatement of the action, in reliance upon the advice of counsel; and a judgment, which is final, goes against them. A large sum matures; they are sued and early advise plaintiff of their defence upon the merits; a defence new and substantive, on which they have never been heard. It would be monstrous that such record should slip, unsuspected, between them and justice.

Very respectfully submitted by

U. P. SMITH and
STEPHEN SIBLEY,
Counsel for Defendants.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 933.

W. O. McCLURE, PLAINTIFF IN ERROR,

vs.

THE TOWNSHIP OF OXFORD, IN SUMNER COUNTY, KANSAS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED NOVEMBER 18, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 933.

W. O. McCLURE, PLAINTIFF IN ERROR,

vs.

THE TOWNSHIP OF OXFORD, IN SUMNER COUNTY, KANSAS,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Judgment	1	1
Certificate of division	3	1
First count of declaration	3	2
Copy of bond	7	3
Demurrer	11	6
Certificate	14	6
Writ of error	15	7
Citation	16	7
Stipulation	18	8

1 In the circuit court of the United States for the district of Kansas.

W. O. McCLURE, PLAINTIFF,
vs.
THE TOWNSHIP OF OXFORD, IN THE COUNTY of Sumner and State of Kansas, defendant. } 1517.

Be it remembered, that on this day, to wit, the 15th day of June, A. D. 1876, in the June term of said court, begun and held at the city of Leavenworth, in said district, on Monday, the 5th day of June, 1876, present, the Hon. John F. Dillon and Hon. C. G. Foster, judges, the following, amongst other, proceedings were had and appear of record in the words and figures following, to wit:

Judgment.

THURSDAY, *June* 15, 1876.

W. O. McCLURE, PLAINTIFF,
vs.
THE TOWNSHIP OF OXFORD, IN THE COUNTY of Sumner and State of Kansas, defendant. } 1517.

Now comes the plaintiff in this action, by Alfred Ennis, his attorney, and also comes the defendant, by A. L. Williams and J. Wade McDonald, its attorneys; and thereupon this cause came on to be heard upon the defendant's demurrer to the plaintiff's petition, which, being argued by counsel and considered by the court, is sustained; and the plaintiff not asking to amend his petition, it is thereupon by the court considered, ordered, and adjudged, that said defendant go hence, without day, and have and recover of and from the plaintiff its costs in
2 this action expended, taxed at $, and that execution issue therefor.

Upon said demurrer there occurred a difference of opinion between the judges; which certificate of division of opinion is as follows:

3 *Certificate of division.*

UNITED STATES OF AMERICA:
In the circuit court of the United States in and for the district of Kansas.

W. O. McCLURE,
vs.
THE TOWNSHIP OF OXFORD, IN THE COUNTY of Sumner and State of Kansas. } Certificate of division.

This is an action upon overdue interest-coupons belonging to certain bonds issued by the defendant.

Declaration.

The declaration contains twenty counts, the first of which is as follows, to wit:

First count of declaration.

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the district of Kansas, to the June term, A. D. 1876.

W. O. McCLURE
vs.
THE TOWNSHIP OF OXFORD, IN THE County of Sumner, and State of Kansas. } Declaration.

W. O. McClure, a resident of the city of Utica, in the county of Oneida, and State of New York, and a citizen of the State of New York, plaintiff, complains of the Township of Oxford, in the county of Sumner and State of Kansas, a public corporation organized and existing under and by virtue of the laws of the State of Kansas, defendant, and says:

1st. That heretofore, to wit, on the 15th day of April, A. D. 1872, in payment for a subscription for stock in the Oxford Bridge Company, which said stock was at the time issued and delivered to and is still held and owned by the said defendant, and to aid in the construction of a bridge across the Arkansas River within the corporate limits of the said defendant, which said bridge was duly constructed and is now in use within the corporate limits of the said defendant, the said defendant in pursuance of an act of the legislature of the State of Kansas entitled "An act authorizing the trustee, treasurer, and clerk, (or any two of them) of the township of Oxford, county of Sumner, and State of Kansas, to subscribe for stock in the 'Oxford Bridge Company,' to the amount of ten thousand dollars to aid in the construction of a bridge across the Arkansas River at Oxford, in said county and State, and to issue the bonds of said township in payment therefor," approved March 1st, A. D. 1872, and in pursuance of a majority vote of the qualified electors of said township had at an election duly held therein
5 on the 8th day of April, A. D. 1872, after thirty days' notice of the time and place of holding such election had first been given by the trustee, treasurer, and clerk of said township by posting written and printed notices thereof in three of the most public places in said township, made, issued, and delivered its certain negotiable bond, bearing date April 15th, A. D. 1872, whereby it promised to pay ten years after the date thereof to the bearer five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually, on the 15th days of April and October of each year, with interest-coupons attached therefor. Both the principal and interest of said bond were made payable at the "American Exchange National Bank," in the city, county, and State of New York; which said bond, in order to distinguish it from others of a like character, was marked No. 1, a copy of which said bond, except the number thereon, is filed herewith and made part hereof, marked "Exhibit A."

That afterwards, to wit, on the 25th day of April, A. D. 1872, said bond, with the interest-coupons attached thereto, was duly registered in the office of the auditor of the State of Kansas, according to law, and the fact that said bond was so registered was then and there, under the hand and seal of the said auditor in writing, duly certified upon said bond; a copy of which certificate of the said auditor is filed herewith and made part hereof, marked "Exhibit B." That afterwards, to wit, on the said 25th day of April, A. D. 1872, the said bond, with the inter-

est-coupons attached thereto, was put upon the market and sold and delivered to bona-fide purchasers, the same passing from hand to hand like other negotiable securities.

6 That afterwards, to wit, at the proper times the said defendant assessed, levied, and collected a tax for the payment of the first, second, third, & fourth interest-coupons attached to said bond, and at the maturity thereof paid the same out of such tax.

That attached to said bond, among others, was a certain interest-coupon, being the sixth interest-coupon, which is in words and figures following, to wit:

$25.00.] Oxford Township.

On the 15th day of April, 1875, the treasurer of the township of Oxford, in the county of Sumner and State of Kansas, will pay to bearer the sum of twenty-five dollars at the American Exchange National Bank, in the city of New York, being the semi-annual interest due on bond No. 1, issued April 15th, A. D. 1872.

(Signed) GEO. T. WALTON, *Trustee.*

Attest:

JOHN H. FOLKS, *Clerk.*

That after the payment of the said first, second, third, & fourth interest-coupons, and before the maturity of the said sixth, being the interest-coupon herein set forth, the same being detached from the said bond, was sold and delivered to the plaintiff.

That when said sixth interest coupon became due and payable, the same was presented for payment at the place where it is made payable, and payment thereof demanded and refused.

That the said sixth interest-coupon, with interest thereon at the rate of seven per cent. per annum since the 15th day of April, A. D. 1875, remains due and wholly unpaid.

7 The other nineteen counts are identically the same as the first, except as to the number of the bond referred to, also the title of the case and the description of the parties being omitted.

The prayer to the declaration is as follows, to wit:

Wherefore the plaintiff prays judgment for five hundred dollars, the principal of the several coupons herein set out, with interest on two hundred and fifty dollars thereof at the rate of seven per cent. per annum since the 15th day of April, 1875, and interest on two hundred and fifty dollars thereof at the rate of seven per cent. per annum since the 15th day of October, 1875, together with all other proper relief.

ALFRED ENNIS,
Atty. for Plff.

(EXHIBIT A.)

Copy of bond.

No. .] OXFORD TOWNSHIP BRIDGE-BOND. [$500.00.

The Township of Oxford, in the county of Sumner and State of Kansas, hereby promises to pay to , or bearer, the sum of five hundred dollars, on the 15th day of April, A. D. 1882, with interest thereon at the rate of ten per cent. per annum, payable semi-annually on the 15th day of October and April of each year, upon the presentation of the coupons therefor hereto attached.

Both principal and interest payable at the American Exchange National Bank, in the city of New York. This bond is one of an issue of ten thousand dollars, made for the purpose of aiding in the building of a bridge across the Arkansas River, at the town of Oxford, in the county of Sumner and State of Kansas, and in pursuance of
8 an act of the legislature of the State of Kansas entitled "An act authorizing the trustee, treasurer, and clerk (or any two of them) of the township of Oxford, in the county of Sumner and State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas River, at Oxford, in said county and State, and to issue the bonds of said township in payment therefor," approved March 1st, 1872, and in pursuance of a vote of the qualified electors of said township had at an election held therein on the 8th day of April, A. D. 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140.

The faith of said township and the receipts for toll of said bridge are pledged to the payment of this bond and interest. In testimony whereof the township trustee, clerk, and treasurer of said township have caused this bond to be issued, duly certified, attested, and countersigned, this 15th day of April, A. D. 1872.

GEORGE T. WALTON,
Trustee.

Attest:
JOHN H. FOLKS,
Clerk.

Countersigned:

T. E. CLARK,
Treasurer.

EXHIBIT B.

I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the legislature, entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of rail-
9 roads, or other works of internal improvements, and providing for the registration of other bonds and the repealing of all laws in conflict therewith," approved March 2d, 1872.

{ SEAL OF AUDITOR OF STATE, KANSAS, APR. 25, 1873. } Witness my hand and official seal this 25th day of April, 1872.

A. THOMAN,
Auditor of State.

The act of the legislature of the State of Kansas referred to in the declaration and in the recitals in the bonds, to which the interest-coupons sued on belong, is as follows, to wit:

CHAPTER CLVIII.—OXFORD TOWNSHIP MAY SUBSCRIBE STOCK.

AN ACT authorizing the trustee, treasurer, and clerk, or any two of them, of the township of Oxford, county of Sumner and State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge

across the Arkansas River at Oxford, in said county and State, and to issue the bonds of said township in payment therefor.

Be it enacted by the legislature of the State of Kansas:

SECTION 1. That the trustee, treasurer, and clerk of Oxford Township, in the county of Sumner and State of Kansas, or any two of them, be, and they are hereby, authorized and directed to issue the bonds of said township to the amount of ten thousand dollars for the purpose of aiding in building and constructing a bridge across the Arkansas River at the town of Oxford, in said county and State.

Bonds.

Bridge.

SEC. 2. The bonds herein provided for shall be issued in sums not less than five hundred dollars each, payable ten years from date of their issuance, and shall draw interest at the rate of ten per centum per annum, payable semi-annually in the city of New York.

When payable.

SEC. 3. That interest-coupons shall be attached to said bonds, and signed by the trustee and attested by the clerk o fsaid township.

SEC. 4. The said bonds shall contain a statement of the purpose for which they were issued, and a reference to the act under which they were issued, and the result of the vote of the inhabitants of said township on the question of the issuance of said bonds.

SEC. 5. Before any of the bonds hereinbefore mentioned shall be issued the question of issuing said bonds shall be submitted to the legal voters of said township at an election to be held for that purpose, which said election shall be conducted in all respects in conformity with the general-election laws of this State. The time and place of holding said election shall be designated by the said trustee, treasurer, and clerk, or any two of them, by giving at least thirty days' notice by posting written or printed notices thereof in three of the most public places in said township. The ballots to be used at said election shall be written or printed, "For the bridge and bonds," or "Against the bridge and bonds," and if at said election a majority of said votes shall be for the bridge and bonds, the said bonds shall be issued, and not otherwise.

Question to be submitted.

SEC. 6. The said township officers shall levy each year, and cause to be collected as other taxes are collected and in the manner provided by an act to authorize municipal townships to issue bonds, and approved March 2, A. D. 1870, a sufficient tax to pay the interest on said bonds as the same may become due and payable, and also a sufficient fund to provide a sinking-fund for the extinguishment of said debt, when it shall become due, for the final redemption of said bonds, and when paid into the proper treasury shall be and remain a specific fund for such purpose only, which said fund and the accumulations and proceeds thereof shall be invested, used, and applied in the manner provided hereinbefore by this act.

Tax to pay interest and create a sinking fund.

SEC. 7. This act shall take effect from and after its publication in the Kansas Weekly Commonwealth.

Approved March 1, 1872.

I hereby certify that the foregoing is a true and correct copy of the original enrolled bill now on file in my office, and that the same was published in the Kansas Weekly Commonwealth March 21, 1872.

W. H. SMALLWOOD,
Secretary of State.

The defendant filed a demurrer to the declaration, which said demurrer is as follows, to wit:

Demurrer.

In the circuit court of the United States for the district of Kansas.

W. O. McCLURE, PLAINTIFF,
vs.
THE TOWNSHIP OF OXFORD, IN THE COUNTY of Sumner, State of Kansas, defendant.

} Demurrer of defendant to the petition of plaintiff.

12 And now comes the said defendant, by its attorney, and demurs to the petition of the plaintiff in this cause, filed against it, and here shows to the court that the matters and allegations in said petition contained are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the defendant, and that the defendant is not bound by law to answer the same.

Wherefore, by reason of the insufficiency of the said petition in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against it.

J. WADE McDONALD,
Attorney for Defendant.

On the hearing of the said demurrer the following questions or points arose, to wit:

First. Whether or not the declaration set forth a good cause of action against the defendant.

Second. Whether or not the said act of the legislature of the State of Kansas, authorizing the issuing of the said bonds, is a constitutional and valid enactment.

Third. Inasmuch as the act under which the bonds were issued went into effect March 21st, 1872, and required thirty days' notice of the time and place of holding the election required to be held before the bonds should be issued, and inasmuch as the bonds are dated on the 15th day of April, 1872, and recite that the election was held on the 8th day of April, 1872, which was only eighteen days after the act authorizing the issue of the bonds took effect, is the defendant estopped from making the defence of the want of proper notice of the elec-
13 tion by reason of receiving and holding the stock in the bridge company, and by reason of having levied and collected a tax for the payment of four instalments of interest on said bonds prior to the purchase of the coupons in suit by the plaintiff, who bought the same when detached, and who had no notice of the want of a proper election other than such as is imparted by the law and the recitals in the bonds.

Upon each of the foregoing questions or points the judges were opposed or divided in opinion, and the said demurrer having been sustained, and final judgment entered thereon for the defendant, the foregoing questions or points on which the judges are divided in opinion are hereby stated and certified, and ordered to be entered of record during the term.

JOHN F. DILLON,
C. G. FOSTER.

14 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a

true, full, and perfect copy of the record of the proceedings of said court, of the judgment, and the certificate of division of opinion of the judges thereon, in the action of W. O. McClure vs. The Township of Oxford, in the county of Sumner, and State of Kansas.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 19th day of August, A. D. 1876.

[SEAL.] A. S. THOMAS, *Clerk.*

15 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between W. O. McClure and the Township of Oxford, in the county of Sumner, and State of Kansas, a manifest error hath happened, to the great damage of the said W. O. McClure, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, this the 15th day of June, A. D. 1876.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

(Indorsed:) No. 1517. W. O. McClure vs. The Township of Oxford, in the county of Sumner, Kansas. Writ of error. Filed June 15, 1876. A. S. Thomas, clerk.

16 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

To the township of Oxford, in the county of Sumner, and State of Kansas:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington, in the District of Columbia, on the second Monday in October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein W. O. McClure is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this the 15th day of June, A. D. 1876.

JOHN F. DILLON, *Judge.*

17 The township of Oxford, in the county Sumner, and State of Kansas, hereby acknowledges service of the within and foregoing citation, and hereby agrees to said action at the time and place therein named this the 15th day of June, A. D. 1876.

A. L. WILLIAMS, &
J. WADE McDONALD,
Attys. for the Township of Oswego, in the County of Labette, and State of Kansas.

(Indorsed:) No. 1517. W. O. McClure vs. The Township of Oxford, in the county of Sumner, Kans. Citation. Filed June 15, 1876. A. S. Thomas, clerk.

18 UNITED STATES OF AMERICA:

In the U. S. Supreme Court, to the October term, A. D. 1876.

W. O. McCLURE, PLAINTIFF IN ERROR,
vs.
THE TOWNSHIP OF OXFORD, IN THE COUNTY of Sumner, and State of Kansas, defendant in error.

It is hereby stipulated and agreed, by and between the parties plaintiff and defendant to the above and foregoing-entitled action, that the certificate of division and record of judgment therein which is attached hereto contains all the record in said cause necessary for the opinion of this court upon the questions certified.

ALFRED ENNIS,
Atty. for Plaintiff in Error.
A. L. WILLIAMS,
Atty. for Defendant in Error.

(Indorsement on cover:) No. 933. W. O. McClure, plaintiff in error, vs. The Township of Oxford, in Sumner County, Kansas. Kansas C. C. U. S. Filed 18 November, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

W. O. McCLURE, *Plaintiff in Error*,
vs.
THE TOWNSHIP OF OXFORD, IN THE COUNTY OF SUMNER, AND STATE OF KANSAS, *Defendant in Error.*

ARGUMENT OF

ALFRED ENNIS,

Attorney for Plaintiff in Error.

GEO. W. MARTIN, KANSAS PUBLISHING HOUSE, TOPEKA.

UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

TO THE OCTOBER TERM, 1876.

W. O. McCLURE, *Plaintiff in Error,*

vs.

THE TOWNSHIP OF OXFORD, IN THE COUNTY OF SUMNER AND STATE OF KANSAS, *Defendant in Error.*

STATEMENT OF THE CASE.

This was an action commenced by the plaintiff in error against the defendant in error, in the Circuit Court of the United States in and for the District of Kansas, at the June term thereof, 1876, to recover the amount due upon twenty over-due interest coupons, the same being for interest due upon twenty negotiable bonds for five hundred dollars each, issued by the defendant in error.

DECLARATION.

The declaration contains *twenty* counts, the *first* of which is as follows, to-wit:

"UNITED STATES OF AMERICA.—IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF KANSAS.

To the June Term, A. D. 1876.

"W. O. McClure
vs.
The Township of Oxford, in the County of Sumner, and State of Kansas.

DECLARATION.

"W. O. McClure, a resident of the city of Utica, in the county of Oneida, and State of New York, and a citizen of the State of New York, plaintiff, complains of the Township of Oxford, in the County of Sumner, and State of Kansas, a public corporation organized and existing under and by virtue of the laws of the State of Kansas, defendant, and says—

"1st, That heretofore, to-wit, on the 15th day of April, A. D. 1872, in payment for a subscription for stock in the Oxford Bridge Company, which said stock *was at the time issued and delivered to and is still held and owned by the said defendant, and to aid in the construction of a bridge across the Arkansas river within the corporate limits of the said defendant, which said bridge was duly constructed and is now in use within the corporate limits of the said defendant*, the said defendant, in pursuance of an act of the Legislature of the State of Kansas, entitled 'An act authorizing the Trustee, Treasurer and Clerk (or any two of them) of the Township of Oxford, County of Sumner, and State of Kansas, to subscribe for stock in the 'Oxford Bridge Company' to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment therefor,' approved March 1st, A. D. 1872, *and in pursuance of a majority vote of the qualified electors of said township, had at an election duly held therein on the 8th day of April, A. D. 1872, after thirty days' notice of the time and place of holding such election had first been given* by the Trustee, Treasurer and Clerk of said township by posting written and printed notices thereof in three of the most public places in said township, made, issued and delivered its certain negotiable bond, bearing date April 15th, A. D. 1872, whereby it promised to pay, ten years after the date thereof, to the bearer, five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually on the 15th day of April and October of each year, with interest coupons attached therefor. Both the principal and interest of said bond were made payable at the 'American Exchange National Bank in the city, county and State of New York,' which said bond, in order to distinguish it from others of a like character, was marked No. 1—a copy of which said bond, except the number thereon, is filed herewith, made part hereof, and marked 'Exhibit A.'

"That afterwards, to-wit: on the 25th day of April, A. D. 1872, said bond with the interest coupons attached thereto, *was duly registered in the office of the Auditor of the State of Kansas according to law*, and the fact that said bond was so registered was then and there under the hand

and seal of the said Auditor in writing, duly certified upon said bond, a copy of which certificate of the said Auditor is filed herewith, made part hereof, and marked 'Exhibit B.'

"That afterwards, to-wit: on the said 25th day of April, A. D. 1872, the said bond with the interest coupons attached thereto, was put upon the market and sold and delivered to *bona fide* purchasers, the same passing from hand to hand like other negotiable securities.

"That afterwards, to-wit: at the proper times, the said defendant *assessed, levied and collected a tax for the payment of the first, second, third and fourth interest coupons attached to said bond, and at the maturity thereof paid the same out of such tax.*

"That attached to said bond among others was a certain interest coupon, being the *sixth* interest coupon, which is in words and figures following, to-wit:

"$25.00. OXFORD TOWNSHIP.

"On the 15th day of April, 1875, the Treasurer of the Township of Oxford, in the County of Sumner and State of Kansas, will pay to bearer the sum of Twenty-five Dollars, at the American Exchange National Bank, in the city of New York, being the semi-annual interest due on Bond No. 1, issued April 15th, A. D. 1872. (Signed) GEO. T. WALTON, *Trustee.*
(Attest) JOHN H. FOLKS, *Clerk.*

"That after the payment of the said *first, second, third and fourth* interest coupons, *and before the maturity of the said* SIXTH, being the interest coupon herein set forth, *the same being detached from said bond, was sold and delivered to the plaintiff.*

"That when said *sixth* interest coupon became due and payable, the same was presented for payment at the place where it is made payable, and payment thereof demanded and refused.

"That the said *sixth* interest coupon, with interest thereon at the rate of seven per cent. per annum since the 15th day of April, A. D. 1875, remains due and wholly unpaid."

The other *nineteen counts* are identically the same as the *first*, except as to the number of the bond referred to, also the title of the case, and the description of the parties being omitted.

The prayer to the Declaration is as follows, to-wit:

"Wherefore, the plaintiff prays judgment for five hundred dollars, the principal of the several interest coupons herein set out, with interest on two hundred and fifty dollars thereof at the rate of seven per cent. per annum since the 15th day of April, 1875, and interest on two hundred and fifty dollars thereof at the rate of seven per cent. per annum since the 15th day of October, 1875, together with all other proper relief.

ALFRED ENNIS, *Attorney for Plaintiff.*"

EXHIBIT A.

[COPY OF BOND.]

"No. —— *Oxford Township Bridge Bond.* $500.00.

"The Township of Oxford, in the County of Sumner and State of Kansas, hereby promises to pay to ———— or bearer the sum of five hundred dollars, on the 15th day of April, A. D. 1882, with interest thereon at the rate of ten per cent. per annum, payable semi-annually on the 15th day of October and April of each year, upon the presentation of the coupons therefor hereto attached. Both principal and interest payable at the American Exchange National Bank, in the City of New York. *This Bond is one of an issue of ten thousand dollars, made for the purpose of aiding in the building of a bridge across the Arkansas River at the town of Oxford, in the County of Sumner and State of Kansas, and in pursuance of an act of the Legislature of the State of Kansas, entitled 'An act authorizing the Trustee, Treasurer, and Clerk (or any two of them) of the Township of Oxford, in the County of Sumner and State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas River at Oxford, in said County and State, and to issue the bonds of said Township in payment therefor,'* approved March 1st, 1872, *and in pursuance of a vote of the qualified electors of said Township, had at an election held therein on the 8th day of April, A. D. 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140.*

"The faith of said township and the receipts for toll of said bridge are pledged to the payment of this bond and interest.

"In testimony whereof the Township Trustee, Clerk and Treasurer of said Township have caused this bond to be issued, duly certified, attested and countersigned, this 15th day of April, A. D. 1872.

GEORGE T. WALTON, *Trustee.*

"Attest: JOHN H. FOLKS, *Clerk.*

Countersigned: T. E. CLARK, *Treasurer.*"

EXHIBIT B.

"I, A. Thoman, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature, entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvements, and providing for the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2d, 1872.

"Witness my hand and official seal, this 25th day of April, 1872.

{SEAL OF AUDITOR OF STATE. KANSAS, APRIL 25, 1873.}

A. THOMAN,
Auditor of State."

The defendant filed a demurrer to the declaration, which said demurrer is as follows, to-wit:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

"W. O. McClure, *Plaintiff*,
vs.
The Township of Oxford, in the County of Sumner, State of Kansas, *Defendant*.

Demurrer of Defendant to the petition of Plaintiff.

"And now comes the said defendant by its attorney, and demurs to the petition of the plaintiff in this cause filed against it, and here shows to the court that the matters and allegations in said petition contained are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the defendant, and that the defendant is not bound by law to answer the same.

"Wherefore, by reason of the insufficiency of the said petition in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against it. J. WADE MCDONALD, *Att'y for Defendant.*"

RULING OF THE COURT.

The Circuit Court sustained said demurrer, whereupon final judgment was entered for the defendant.

DIVISION OF OPINION.

That at the hearing of said demurrer the following questions or points arose, upon each of which the judges were divided or opposed in opinion, to-wit:

"*First:* Whether or not the declaration set forth a good cause of action against the defendant?

"*Second:* Whether or not the said act of the Legislature of the State of Kansas, authorizing the issuing of the said bonds, is a constitutional and valid enactment?

"*Third:* Inasmuch as the act under which the bonds were issued went into effect March 21st, 1872, and required thirty days' notice of the time and place of holding the election required to be held, before the bonds should be issued, and inasmuch as the bonds are dated on the 15th day of April, 1872, and recite that

the election was held on the 8th day of April, 1872, which was only eighteen days after the act authorizing the issue of the bonds took effect, is the defendant estopped from making the defense of the want of proper notice of the election by reason of receiving and holding the stock in the Bridge Company, and by reason of having levied and collected a tax for the payment of four installments of interest on said bonds prior to the purchase of the coupons in suit by the plaintiff, who bought the same when detached, and who had no notice of the want of a proper election other than such as is imparted by the law and the recitals in the bond?"

ASSIGNMENT OF ERROR.

The plaintiff in error assigns as error the ruling of the Circuit Court in sustaining the demurrer of the defendant in error to the declaration of the plaintiff in error.

ARGUMENT.

Does the declaration set forth a good cause of action? This is the *only* question presented for the decision of this court. To determine this question involves the full consideration of the *first*, *second* and *third* questions certified.

THE ACT.

The act of the Legislature, under and in pursuance of which the bonds were issued to which the interest coupons sued on belong, is as follows, to-wit:

"OXFORD TOWNSHIP—MAY SUBSCRIBE STOCK.

"An act authorizing the trustee, treasurer and clerk (or any two of them) of the Township of Oxford, County of Sumner, and State of Kansas, to subscribe for stock in the 'Oxford Bridge Company' to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment therefor.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That the trustee, treasurer and clerk of Oxford township, in the county of Sumner, and State of Kansas, (or any two of them,) be and they are hereby authorized and directed to issue the bonds of said township to the amount of ten thousand dollars, for the purpose of aiding in building and constructing a bridge across the Arkansas river at the town of Oxford, in said county and State.

"SEC. 2. The bonds herein provided for shall be issued in sums not less than five hundred dollars, each payable ten years from date of their issuance, and shall draw interest at the rate of ten per cent. per annum, payable semi-annually in the city of New York.

"SEC. 3. That interest coupons shall be attached to said bonds, and signed by the trustee, and attested by the clerk of said township.

"SEC. 4. The said bonds shall contain a statement of the purpose for which they were issued, and a reference to the act under which they were issued, and the result of the vote of the inhabitants of said township on the issuance of said bonds.

"SEC. 5. Before any of the bonds hereinbefore mentioned shall be issued, the question of issuing said bonds shall be submitted to the legal voters of said township at an election to be held for that purpose, which said election shall be conducted in all respects in conformity with the general election laws of this State. The time and place of holding said

election shall be designated by the said trustee, treasurer and clerk, (or any two of them,) by giving at least thirty days' notice by posting written or printed notices thereof in three of the most public places in said township. The ballots to be used at said election shall be written or printed, 'For the bridge and bonds,' or, 'Against the bridge and bonds;' and if at said election a majority of said votes shall be for the bridge and bonds, the said bonds shall be issued, and not otherwise.

"SEC. 6. The said township officers shall levy each year, and cause to be collected as other taxes are collected, and in the manner provided by 'An act to authorize municipal townships to issue bonds,' and approved March 2, A. D. 1870, a sufficient tax to pay the interest on said bonds as the same may become due and payable, and also a sufficient fund to provide a sinking fund for the extinguishment of said debt when it shall become due, for the final redemption of said bonds, and when paid into the proper treasury shall be and remain a specific fund for such purpose only; which said fund and the accumulations and proceeds thereof shall be invested, used and applied in the manner provided hereinbefore by this act.

"SEC. 7. This act shall take effect from and after its publication in the *Kansas Weekly Commonwealth*.

"Approved March 1, 1872.

"I hereby certify that the foregoing is a true and correct copy of the original enrolled bill now on file in my office, and that the same was published in the *Kansas Weekly Commonwealth* March 21, 1872.

"W. H. SMALLWOOD, *Secretary of State*."

THE ACT CONSTITUTIONAL AND VALID.

The act does not infringe SECTION 17 OF ARTICLE 2, or SECTION 1 OF ARTICLE 12 of the constitution of the State of Kansas, hence *is constitutional* and *valid*. See *Beach vs. Leahy, Treasurer*, 11 Kas., 23; *Austin vs. Township of Mission*, unreported decision of Judge DILLON at the November Term, 1874, of the U. S. Circuit Court for the District of Kansas; and *The Citizens' Savings and Loan Association of Cleveland, Ohio, vs. The Township of Blue Rapids*, and *W. O. McClure vs. The Township of Rockford*, both unreported decisions of Judge DILLON at the June Term, 1876, of the U. S. Circuit Court for the District of Kansas.

THE ACT NOT REPEALED.

This act, being a *special act*, approved March 1st, 1872, which was published and took effect March 21st, 1872, was *not* repealed by the *general act* entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2d, 1872, and which was published and took effect March 7th, 1872.

A *general law* will *not be held* to repeal a *particular and special law* upon the same subject. See *Ellis vs. Botts*, 26 Texas, 703.

The repeal of a *special law for a specific purpose must be express*, or by the language and scope of a subsequent act equivalent to an express repeal. See *Cole vs. Supervisors*, 11 Iowa (3 With.) 552.

A later statute which is *general and affirmative*, does not abrogate a former one which is *particular*, unless negative words are used, or unless the two acts are irreconcilably inconsistent or repugnant. See *McVey vs. McVey*, 51 Mo., 406.

To constitute the repeal of a statute by implication, the new statute must cover the whole subject-matter of the old one, and prescribe different penalties. There must be an irreconcilable repugnancy between the two acts. See *Coghill vs. State*, 37 Ind. 111; *Hamlyn vs. Nesbit*, 37 Ind., 284.

It is *not* sufficient to establish the repeal of a statute by implication, to show that a subsequent law covers *some* or even *all* of the cases for which it provides; for

it may be *merely affirmative*, or *cumulative*, or *auxiliary*. To create a repeal by implication there must be *a positive repugnancy* between the provisions of the *new law* and those of the *old;* and even then the old is repealed by implication, *only* to the *extent of the repugnancy*. See *Wood vs. United States*, 16 Pet., 342; *Daviess vs. Fairbairn*, 3 Howard, 636; *Harden vs. Gordon*, 2 Mass., 540.

PLAINTIFF IN ERROR NOT CHARGED WITH NOTICE OF IRREGULARITY.

The plaintiff in error, who is a *bona fide* holder for value of the interest coupons sued on, and who purchased the same before due, when *detached* from the bonds to which they were originally attached, is *not* charged with notice of any irregularity in the matter of the notice of the time and place of holding the election at which such bonds were voted, that may appear upon the face of the same.

Interest coupons payable to bearer are *negotiable instruments*, and when severed from the bonds to which they were originally attached, *cease to be incidents of the bonds and become independent claims, and are in legal effect equivalent to separate bonds for the different instalments of interest.* See *Clark vs. Iowa City*, 20 Wall., 583; vol. 13 Albany Law Journal, 350.

Interest coupons separated from their bonds are, in law, regarded as bank-bills, and a *bona fide* purchaser, in the usual course of business, for full value, without notice, will be protected, although the interest coupons were over-due when sold, and were stolen by the party disposing of them to the purchaser. See *Evertsen vs. Nat. Bank of Newport*, 4 Hun. (N. Y.) 692; vol. 13 Albany Law Journal, 350.

The plaintiff in error is a resident and citizen of the State of New York, and is *not presumed* to have notice of the laws of the State of Kansas, but on the contrary *is presumed* to be *unacquainted* with, and *ignorant* of, such laws, and can only be charged with knowledge of the same by *actual proof* of the fact. See Edwards on Bills and Promissory Notes, page 348; Kerr on Fraud and Mistake, 402; *The Bank of Chillicothe vs. Dodge,* 8 Barb., 233; *Curtis et al. vs. Leavitt,* 15 N. Y., page 193.

SECTION 19 of ARTICLE 2 of the Constitution of the State of Kansas provides that no law of a *general nature* shall be in force until the same be published. The act under which the bonds were issued is a *special act,* hence might have taken effect and become a law *without publication,* there being *no* constitutional requirement for the publication of *special acts.*

THE RECITALS ON THE FACE OF THE BONDS CONCLUSIVE AGAINST THE DEFENDANT IN ERROR.

The bonds to which the interest coupons sued on belong contain upon their face the following recital, to-wit: "This bond is one of an issue of ten thousand dollars, made for the purpose of aiding in the building of a bridge across the Arkansas river at the town of Oxford, in the county of Sumner and State of Kansas, and in pursuance of an act of the Legislature of the State of Kansas, entitled 'An act authorizing the trustee, treasurer, and clerk (or any two of them) of the township of Oxford, in the county of Sumner and State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge

across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment therefor,' approved March 1st, 1872, and in pursuance of a vote of the qualified electors of said township, had at an election held therein on the 8th day of April, A. D. 1872, which said election resulted in a majority of 112 in favor of issuing said bonds in a total vote of 140. The faith of said township and the receipts for toll of said bridge are pledged to the payment of this bond and interest." Each bond also declares that the township trustee, clerk and treasurer of said township have caused it to be issued, duly certified, attested and countersigned, and is accordingly signed by the township trustee, attested by the township clerk, and countersigned by the township treasurer. The bonds were registered in the office of the Auditor of State according to law, and the fact of such registration duly certified by said Auditor under his hand and official seal, in writing, upon the back of each bond, reciting that such bond had been *regularly* and *legally* issued, &c., before the purchase of the interest coupons sued on by the plaintiff.

The first section of the act directs the trustee, treasurer, and clerk, or any two of them, to issue the bonds.

The fourth section directs that the bonds shall contain a statement of the purpose for which they were issued, and a reference to the act under which they were issued, together with the result of the vote of the inhabitants of the township.

The fifth section directs that before the bonds shall be issued, the question of issuing the same shall be submitted to the legal voters of the township at an election to be held for that purpose, the said election to

be conducted in all respects in conformity with the general election laws of the State — the time and place of holding such election to be designated by the trustee, treasurer, and clerk, or any two of them, by giving at least thirty days' notice by posting written or printed notices thereof in three of the most public places in the township; and if at such election a majority of the votes be in favor of the issuance of the bonds, then the same to be issued.

Thus it will be seen that the township trustee, treasurer, and clerk, or any two of them, were constituted the agents of the township to execute the power granted, and were therefore fully clothed with authority to determine whether or not the *precedent facts* existed to warrant the issuing of the bonds. The trustee, treasurer and clerk determined that the *precedent facts* existed to warrant the issuing of the bonds, and accordingly issued the same, reciting upon the face of the bonds that such *precedent facts* existed, that is, that such bonds *were issued in pursuance of the act*, and *in pursuance of a majority vote* of the qualified electors of the township had at an election held therein for that purpose. This determination is *final* and *conclusive* against the township in this action by the plaintiff in error, who is a *bona fide* holder for value of the interest coupons sued on, and who purchased the same before due, when *detached* from the bonds. See *Marcy vs. The Township of Oswego; The Town of Coloma vs. Evans; The Town of Venice vs. Murdock*, and *The Town of Genoa vs. James O. Woodruff, et al.* — all decided by this court at the November Term, A. D. 1875.

The recital upon the face of the bonds, that they

had been issued *in pursuance of the act* and *in pursuance of a majority vote of the qualified electors of the township, at an election held therein for that purpose,* being a *final* and *conclusive* determination against the township that all the *precedent facts* existed to warrant the issuing of the bonds, is *stronger* in favor of the plaintiff in error, who is a *bona fide* holder, for value, of the interest coupons sued on, and who purchased the same before due when *detached* from the bonds, than any *mere constructive* notice of *presumed* irregularity in the matter of the thirty days' notice of the time and place of holding the election at which the bonds were voted, that might be detected after a *critical examination* of the recitals in the bonds, when taken in connection with the *exact date* when the act was published and took effect — which last fact *does not* appear upon the face of the bonds, and *in fact was unknown to the plaintiff in error.* It is stated in the *third* question certified,* that the plaintiff in error *had no notice* of the supposed irregularity, unless such notice was imparted by the recitals in the bonds and by the act. The recitals in the bonds, in the absence of the act, impart *no notice* of such irregularity, but on the contrary such recitals show that the act was approved March 1st, 1872, more than thirty days before the time of holding the election.

DECLARATION ALLEGES THIRTY DAYS' NOTICE.

The declaration alleges that the bonds were issued *in pursuance of the act,* and *in pursuance of a majority vote of the qualified electors of the township, had at an election duly held therein on the 8th day of April, 1872,*

*See pages 5 and 6.

AFTER THIRTY DAYS' NOTICE OF THE TIME AND PLACE OF HOLDING SUCH ELECTION HAD FIRST BEEN GIVEN by the trustee, treasurer and clerk of the township, by posting written or printed notices thereof in three of the most public places in the township. This allegation is admitted by the demurrer to be true. If thirty days' notice of the time and place of holding such election was *actually given*, then all *supposed* irregularity in the matter of the notice of such election *is removed*. The act was approved on the first day of March, 1872, and more than thirty days prior to the time of holding the election on the 8th day of April following. The most reasonable explanation of the matter is, that upon the approval of the act, the officers of the township, who resided more than one hundred and fifty miles from the capital of the State, where the Legislature was in session, believing that the act would be published and take effect immediately following its approval, as was then the custom respecting the publication of all acts, proceeded to and did give notice of the time and place of holding the election contemplated by the act, without reference to the time when the act was published and took effect.

THE DEFENDANT IN ERROR IS ESTOPPED.

The act is *constitutional and valid. It authorizes and empowers the defendant in error to issue and deliver the bonds.* The defendant in error, in pursuance of the act, issued and delivered, *in payment for stock in the Bridge Company, and to aid in the construction of a bridge, which was constructed and is now in use within its corporate limits,* the bonds, which recite upon their face that they had been issued *in pursuance of the act and a majority vote*

of the qualified electors of the township, and *the purpose for which they were issued,* received and still holds the stock of the Bridge Company as the consideration for the bonds; permitted the bonds to be registered in the office of the Auditor of State according to law, and to be put upon the market and sold to *bona fide* purchasers for value; assessed, levied and collected a tax to pay the *first, second, third,* and *fourth* interest coupons belonging to the bonds, and paid the same at maturity out of such tax; — all prior to the purchase of the interest coupons sued on by the plaintiff in error, who purchased such interest coupons before due, when *detached* from the bonds, without *actual notice* of any supposed irregularity in the matter of the notice of the time and place of holding the election at which the bonds were voted; and is therefore estopped from making the defense of such *supposed irregularity.* See *Marcy vs. The Township of Oswego; The Town of Venice vs. Murdock; The Town of Coloma vs. Evans;* and *The Town of Genoa vs. James O. Woodruff et al.* — all decisions of this court at the October Term, 1875.

Corporations, including public or municipal, are bound by estoppel the same as natural persons. See Bigelow on Estoppel, 464; Herman's Law of Estoppel, 509 and 512; *Moran et al. vs. The Commissioners of Miami County,* 2 Black (U. S.), 722; *Zabriskie vs. Cleveland, etc., Railroad Company,* 23 Howard, 400; *Commissioners of Knox County vs. Aspinwall,* 21 Howard, 539; *Rogers vs. Burlington,* 3 Wallace, 654; *Pendleton County vs. Amy,* 13 Wallace, 297; *The Town of Keithsburg vs. Charles A. Frick,* 34 Illinois, 405; *Royal British Bank vs. Tarward,*

6 Ellis and Blackburne, 327; *Hale vs. Uni* , *etc., Insurance Company*, 32 N. H., 295.

In KENT'S Com. (Comstock's edition), vol. 4, page 282, the author says:

"The sense of estoppel is, that a man, for the sake of good faith and fair dealing, ought to be estopped from saying that to be false which, by his means, has once become accredited for truth, and by his representations has led others to act." See *Lee vs. Tellotson*, 24 Wend., 337; 3 Hill, 219.

Every person is bound to speak and act according to the truth, and the law will presume such to be done, and will not allow such presumption to be contradicted. See *Pelletreau vs. Jackson*, 11 Wend., 117; *Jackson vs. Waldon*, 13 Wend., 178.

In the case of *Society for Savings vs. The City of New London*, 29 Conn., 174, which was an action upon interest coupons or warrants belonging to certain bonds issued by the city of New London, to be loaned upon proper security, to the New London, Willimantic and Springfield Railroad Company — a corporation. These bonds were delivered and put upon the market and passed into the hands of *bona fide holders*, with the knowledge of the inhabitants of the city of New London. Some of them had been deposited with the Treasurer of State by certain banks as security for their circulation, and the city having paid the semi-annual interest for several years. During all this time no citizen had taken any measures to prevent the sale of the bonds or the payment of the interest. It was held that the city, under these circumstances, *was equitably estopped* from denying the validity of the bonds against

parties who held them in good faith, and that *individual citizens and tax-payers*, having thus acquiesced in the conduct of the city, *were also estopped* from denying their validity, so far as their individual rights were concerned. Justice ELLSWORTH, in delivering the opinion of the court, says (see pp. 190, 192, 193, 194):

"These bonds soon passed into the hands of *bona fide* holders at something more than their par value. Some were taken by individuals and some by banks of this State. * * * * The most unreserved publicity was given to all these proceedings, and no objection was ever made by any of the citizens of New London. Further, for several years the city of New London continued to *pay the coupons* attached to the bonds, and these payments regularly appeared in the city treasurer's annual reports.

"Now, if this be all there is in the case, it is most obvious that the city *can make no valid defense to the suit.* We propose to show, in effect, that this is so, certainly as to *bona fide* holders of the bonds, whether we examine the case upon principles of natural justice or of law and equity.

"The proceedings of the city in issuing the bonds were well known to all the citizens. We must consider them as conversant with the votes of April 14 and July 31, and everything that was done under the votes; the issuing of the bonds in the name of the city; the delivery of them to the New London, Willimantic and Palmer railroad corporation for their use; the advertisement of them in the public papers, and the fact that they were bought by honest purchasers, from time to time, for the ultimate benefit of the citizens themselves. They knew, too, that the bonds were taken by

the Treasurer of the State as security for the issue of bank paper. If all this was without authority, *why*, we ask, did not the *citizens then* make their objections? *Why* did they *not enjoin* the city agents from further proceedings? At least, *why did they not give notice* to the public, and put purchasers on their guard, when they knew that a grievous loss must ensue if the bonds were unauthorized? We must believe that, after such acquiescence, it would be an outrage upon morality and justice, and an impeachment of the integrity of the citizens of New London, to allow the city to repudiate its obligations for such a cause. Many of the citizens, we well know, disapprove and condemn such a repudiation, and we trust all of them would do so were it a simple transaction between man and man, where the culpability could not be thrown off upon a municipal corporation. But it is this very circumstance which enhances the impropriety of the act of repudiation, for the integrity of a public body is its principal virtue. To violate or impair this is to undermine government itself and to destroy the very institutions of the civil state. Such repudiation cannot receive the countenance of this court of justice. (The following authorities are here cited and approved, to-wit:)

"*The State vs. Van Horn*, 7 Ohio St., 327; *Knox County Commissioners vs. Aspinwall*, 21 Howard, 539; *Tash vs. Adams*, 10 Cush., 252; *Graham vs. Maddox*, 6 American Law Reg., 595, 618; *Gould vs. Venice*, 29 Barb., 442.

"It was said on the argument, that however proper it might be to compel the city of New London to fulfill her engagements, if the city, as such, were alone affected, yet that *individual citizens, tax-payers*, have rights

of their own, which they may defend in the name of the corporate body. But we can recognize *no* such independent character in the citizen. Besides, the city alone appears here to defend. And, if the individual citizens were to be considered as appearing for themselves, they could only defend in the name and according to the rights of the city.

"As we have already said, *if we may look through* the body to notice the individuals as distinct from the corporation, we must notice them as individuals throughout the proceedings upon which we have been commenting, and then we see them *sitting with folded hands, silently countenancing the usurpation and fraud* of which *they are now* complaining."

The foregoing decision is *cited* and *approved* by the U. S. Supreme Court in the case of *Moran vs. Commissioners of Miami County*, 2 Black, on page 732.

In the case of *The President and Trustees of the Town of Keithsburg vs. Frank*, 34 Ill., 405, which was an action upon interest coupons belonging to certain bonds issued by the town of Keithsburg to the Warsaw & Rockford Railroad Company, the bonds were delivered and put upon the market, and passed into the hands of *bona fide* holders. The town of Keithsburg assessed, levied and collected taxes for the interest upon these bonds for several years. It was held that the town was estopped from questioning the validity of the bonds. Justice BREESE, in delivering the opinion of the court, says (see pp. 421, 422):

"Whether, then, the bonds were issued in and by virtue of the second section of the act of 1857, or of the 17th section, we think the corporation is *estopped*

from now setting up any irregularity in their issue, inasmuch as they *have repeatedly recognized* their validity *by paying them out, levying taxes and paying interest on them for a series of years.* It is now too late to raise a question as to the regularity of their issue." See *Maher vs. City of Chicago,* 38 Ill. 266.

In the case of *Zabriskie vs. Cleveland, etc., Railroad Co. et. al.,* 23 Howard, 381, Justice CAMPBELL, in delivering the opinion of the court, says (see pp. 400, 401):

"These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded.

"A *corporation,* quite as much as an individual, is held to a careful adherence to the truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." See *Knox County vs. Aspinwall,* 21 Howard, 548; *The Rector, etc., of Christ Church, etc., vs. The County of Philadelphia,* 24 Howard, 300; *Rogers vs. Burlington,* 3 Wallace, 654.

THE BOND AND REGISTRATION LAW.

Sections 14 and 15 of the bond and registration law of Kansas read as follows, to-wit:

"SEC. 14. Within thirty days after the delivery of such bonds, the holder thereof shall present the same to the Auditor of State for registra-

tion, and the Auditor shall, *upon being satisfied that such bonds have been issued according to the provisions of this act*, and that the signatures thereto of the officers signing the same are genuine, register the same in his office, in a book to be kept for that purpose, in the same manner that such bonds are registered by the officers issuing the same, and shall, under his seal of office, certify upon such bonds *the fact that they have been regularly and legally issued;* that the signatures thereto are genuine, and that such bonds have been registered in his office according to law; for which registration and certificate the Auditor shall be entitled to a fee of one dollar for each bond so registered, to be paid by the holder thereof.

"SEC. 15. That the holders of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this State, may have the benefits of this act by having such bonds registered in the office of said Auditor of State, as provided herein, for the registration of bonds [issued] by virtue hereof. It shall be the duty of the Auditor of State, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds." *

Thus it will be seen that the Auditor of State was by law *clothed with the exclusive power of ascertaining and determining certain facts*, to-wit: That of whether or not the bonds had been issued in accordance with the provisions of the act, and whether or not the signatures thereto were genuine — if so, then under his *hand and seal of office to certify such determination* upon such bonds. The Auditor of State DID determine that the bonds had been issued in accordance with the provisions of the act and that the signatures thereto were genuine, and *under his hand and seal of office certified such determination* upon said bonds. This determination is *final* and *conclusive*, and *cannot* now be inquired into in a *collateral* proceeding — see *Bissell vs. City of Jeffersonville*, 24 Howard, 287; *Porter vs. Purdy et al.*, 29 N. Y., 106; *The Evansville & C. R. R. vs. The City of Evansville*, 15 Ind., 395.

* See Laws of Kansas, 1872, page 116.

WHEREFORE, the plaintiff in error prays that the judgment of the circuit court in sustaining the demurrer to the petition and rendering judgment in favor of the defendant in error be reversed.

ALFRED ENNIS,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1876.

W. O. McCLURE, *Plaintiff in Error*,

vs.

THE TOWNSHIP OF OXFORD, IN THE COUNTY OF SUMNER AND STATE OF KANSAS, *Defendant in Error*.

ARGUMENT OF A. L. WILLIAMS,

Attorney for Defendant in Error.

GEO. W. MARTIN, KANSAS PUBLISHING HOUSE, TOPEKA.

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vs.

THE TOWNSHIP OF OXFORD, IN THE COUNTY OF SUMNER AND STATE OF KANSAS, *Defendant in Error.*

ARGUMENT OF A. L. WILLIAMS,

Attorney for Defendant in Error.

STATEMENT OF THE CASE.

This was an action commenced by the plaintiff in error against the defendant in error, in the Circuit Court of the United States in and for the District of Kansas, at the June term thereof, 1876, to recover the amount due upon twenty over-due interest coupons, the same being for interest due upon twenty negotiable bonds for five hundred dollars each, issued by the defendant in error.

DECLARATION.

The declaration contains *twenty* counts, the *first* of which is as follows, to wit:

"UNITED STATES OF AMERICA.—IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF KANSAS.

To the June Term, A. D. 1876.

"W. O. McClure
vs.
The Township of Oxford, in the County of Sumner, and State of Kansas. } DECLARATION.

"W. O. McClure, a resident of the city of Utica, in the county of Oneida, and State of New York, and a citizen of the State of New York, plaintiff, complains of the Township of Oxford, in the County of Sumner, and State of Kansas, a public corporation organized and existing under and by virtue of the laws of the State of Kansas, defendant, and says—

"1st, That heretofore, to wit, on the 15th day of April, A. D. 1872, in payment for a subscription for stock in the Oxford Bridge Company, which said stock *was at the time issued and delivered to and is still held and owned by the said defendant, and to aid in the construction of a bridge across the Arkansas river within the corporate limits of the said defendant, which said bridge was duly constructed and is now in use within the corporate limits of the said defendant*, the said defendant, in pursuance of an act of the Legislature of the State of Kansas, entitled 'An act authorizing the Trustee, Treasurer and Clerk (or any two of them) of the Township of Oxford, County of Sumner, and State of Kansas, to subscribe for stock in the 'Oxford Bridge Company' to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment therefor,' approved March 1st, A. D. 1872, *and in pursuance of a majority vote of the qualified electors of said township, had at an election duly held therein on the 8th day of April, A. D. 1872, after thirty days notice of the time and place of holding such election had first been given* by the Trustee, Treasurer and Clerk of said township by posting written and printed notices thereof in three of the most public places in said township, made, issued and delivered its certain negotiable bond, bearing date April 15th, A. D. 1872, whereby it promised to pay, ten years after the date thereof, to the bearer, five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually on the 15th day of April and October of each year, with interest coupons attached therefor. Both the principal and interest of said bond were made payable at the 'American Exchange National Bank in the city, county and State of New York,' which said bond, in order to distinguish it from others of a like character, was marked No. 1—a copy of which said bond, except the number thereon, is filed herewith, made part hereof, and marked 'Exhibit A.'

"That afterwards, to wit: on the 25th day of April, A. D. 1872, said bond with the interest coupons attached thereto, *was duly registered in the office of the Auditor of the State of Kansas, according to law*, and the fact that said bond was so registered was then and there under the hand

and seal of the said Auditor in writing, duly certified upon said bond, a copy of which certificate of the said Auditor is filed herewith, made part hereof, and marked 'Exhibit B.'

"That afterwards, to wit: on the said 25th day of April, A. D. 1872, the said bond with the interest coupons attached thereto, was put upon the market and sold and delivered to *bona fide* purchasers, the same passing from hand to hand like other negotiable securities.

"That afterwards, to wit: at the proper times, the said defendant *assessed, levied and collected a tax for the payment of the first, second, third and fourth interest coupons attached to said bond, and at the maturity thereof paid the same out of such tax.*

"That attached to said bond among others was a certain interest coupon, being the *sixth* interest coupon, which is in words and figures following, to wit:

"$25.00. OXFORD TOWNSHIP.

"On the 15th day of April, 1875, the Treasurer of the Township of Oxford, in the County of Sumner and State of Kansas, will pay to bearer the sum of Twenty-five Dollars, at the American Exchange National Bank, in the city of New York, being the semi-annual interest due on Bond No. 1, issued April 15th, A. D. 1872. (Signed) GEO. T. WALTON, *Trustee.*
Attest: JOHN H. FOLKS, *Clerk.*

"That after the payment of the said *first, second, third and fourth* interest coupons, *and before the maturity of the said* SIXTH, being the interest coupon herein set forth, *the same being detached from said bond, was sold and delivered to the plaintiff.*

"That when said *sixth* interest coupon became due and payable, the same was presented for payment at the place where it is made payable, and payment thereof demanded and refused.

"That the said *sixth* interest coupon, with interest thereon at the rate of seven per cent. per annum since the 15th day of April, A. D. 1875, remains due and wholly unpaid."

The other *nineteen counts* are identically the same as the *first*, except as to the number of the bond referred to, also the title of the case, and the description of the parties being omitted.

The prayer to the declaration is as follows, to wit:

"Wherefore, the plaintiff prays judgment for five hundred dollars, the principal of the several interest coupons herein set out, with interest on two hundred and fifty dollars thereof at the rate of seven per cent. per annum since the 15th day of April, 1875, and interest on two hundred and fifty dollars thereof at the rate of seven per cent. per annum since the 15th day of October, 1875, together with all other proper relief.

ALFRED ENNIS, *Attorney for Plaintiff.*"

EXHIBIT A.

[COPY OF BOND.]

"No. —— *Oxford Township Bridge Bond.* $500.00.

"The township of Oxford, in the County of Sumner and State of Kansas, hereby promises to pay to ———— or bearer the sum of five hundred dollars, on the 15th day of April, A. D. 1882, with interest thereon at the rate of ten per cent. per annum, payable semi-annually on the 15th day of October and April of each year, upon the presentation of the coupons therefor hereto attached. Both principal and interest payable at the American Exchange National Bank, in the City of New York. *This Bond is one of an issue of ten thousand dollars, made for the purpose of aiding in the building of a bridge across the Arkansas River at the town of Oxford, in the County of Sumner and State of Kansas, and in pursuance of an act of the Legislature of the State of Kansas, entitled 'An act authorizing the Trustee, Treasurer, and Clerk (or any two of them) of the Township of Oxford, in the County of Sumner and State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas River at Oxford, in said County and State, and to issue the bonds of said Township in payment therefor,'* approved March 1st, 1872, *and in pursuance of a vote of the qualified electors of said Township, had at an election held therein on the 8th day of April, A. D.* 1872, *which said election resulted in a majority of* 112 *in favor of issuing said bonds in a total vote of* 140.

"The faith of said township and the receipts for toll of said bridge are pledged to the payment of this bond and interest.

"In testimony whereof the Township Trustee, Clerk and Treasurer of said Township have caused this bond to be issued, duly certified, attested and countersigned, this 15th day of April, A. D. 1872.

GEORGE T. WALTON, *Trustee.*

"Attest: JOHN H. FOLKS, *Clerk.*

Countersigned: T. E. CLARK, *Treasurer.*"

EXHIBIT B.

"I, A. Thoman, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that such bond has been duly registered in my office in accordance with an act of the Legislature, entitled 'An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, or other works of internal improvements, and providing for the registration of other bonds, and the repealing of all laws in conflict therewith,' approved March 2d, 1872.

"Witness my hand and official seal, this 25th day of April, 1872.

{SEAL OF AUDITOR OF STATE. KANSAS, APRIL 25, 1872.}

A. THOMAN,
Auditor of State."

The defendant filed a demurrer to the declaration, which said demurrer is as follows, to wit:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

"W. O. McClure, *Plaintiff*,
vs.
The Township of Oxford, in the County of Sumner, State of Kansas, *Defendant*.

Demurrer of Defendant to the petition of Plaintiff.

"And now comes the said defendant by its attorney, and demurs to the petition of the plaintiff in this cause filed against it, and here shows to the court that the matters and allegations in said petition contained are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the defendant, and that the defendant is not bound by law to answer the same.

"Wherefore, by reason of the insufficiency of the said petition in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against it. J. WADE MCDONALD, *Att'y for Defendant.*"

RULING OF THE COURT.

The Circuit Court sustained said demurrer, whereupon final judgment was entered for the defendant.

DIVISION OF OPINION.

That at the hearing of said demurrer the following questions or points arose, upon each of which the judges were divided or opposed in opinion, to wit:

"*First:* Whether or not the declaration set forth a good cause of action against the defendant?

"*Second:* Whether or not the said act of the Legislature of the State of Kansas, authorizing the issuing of the said bonds, is a constitutional and valid enactment?

"*Third:* Inasmuch as the act under which the bonds were issued went into effect March 21st, 1872, and required thirty days notice of the time and place of holding the election required to be held, before the bonds should be issued, and inasmuch as the bonds are dated on the 15th day of April, 1872, and recite that

the election was held on the 8th day of April, 1872, which was only eighteen days after the act authorizing the issue of the bonds took effect, is the defendant estopped from making the defense of the want of proper notice of the election by reason of receiving and holding the stock in the Bridge Company, and by reason of having levied and collected a tax for the payment of four installments of interest on said bonds prior to the purchase of the coupons in suit by the plaintiff, who bought the same when detached, and who had no notice of the want of a proper election other than such as is imparted by the law and the recitals in the bond?"

ASSIGNMENT OF ERROR.

The plaintiff in error assigns as error the ruling of the Circuit Court in sustaining the demurrer of the defendant in error to the declaration of the plaintiff in error.

THE ACT.

The act of the Legislature, under and in pursuance of which the bonds were issued to which the interest coupons sued on belong, is as follows, to wit:

"OXFORD TOWNSHIP—MAY SUBSCRIBE STOCK.

"An act authorizing the trustee, treasurer and clerk (or any two of them) of the Township of Oxford, County of Sumner, and State of Kansas, to subscribe for stock in the 'Oxford Bridge Company' to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment therefor.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. That the trustee, treasurer and clerk of Oxford township, in the county of Sumner, and State of Kansas, (or any two of them,) be and they are hereby authorized and directed to issue the bonds of said township to the amount of ten thousand dollars, for the purpose of aiding in building and constructing a bridge across the Arkansas river at the town of Oxford, in said county and State.

"SEC. 2. The bonds herein provided for shall be issued in sums not less than five hundred dollars, each payable ten years from date of their issuance, and shall draw interest at the rate of ten per cent. per annum, payable semi-annually in the city of New York.

"SEC. 3. That interest coupons shall be attached to said bonds, and signed by the trustee, and attested by the clerk of said township.

"SEC. 4. The said bonds shall contain a statement of the purpose for which they were issued, and a reference to the act under which they were issued, and the result of the vote of the inhabitants of said township on the issuance of said bonds.

"SEC. 5. Before any of the bonds hereinbefore mentioned shall be issued, the question of issuing said bonds shall be submitted to the legal voters of said township at an election to be held for that purpose, which said election shall be conducted in all respects in conformity with the general election laws of this State. The time and place of holding said election shall be designated by the said trustee, treasurer and clerk, (or any two of them,) by giving at least thirty days notice by posting written or printed notices thereof in three of the most public places in said township. The ballots to be used at said election shall be written or printed, 'For the bridge and bonds,' or, 'Against the bridge and bonds;' and if at said election a majority of said votes shall be for the bridge and bonds, the said bonds shall be issued, and not otherwise.

"SEC. 6. The said township officers shall levy each year, and cause to be collected as other taxes are collected, and in the manner provided by 'An act to authorize municipal townships to issue bonds,' and approved March 2, A. D. 1870, a sufficient tax to pay the interest on said bonds as the same may become due and payable, and also a sufficient fund to provide a sinking fund for the extinguishment of said debt when it shall become due, for the final redemption of said bonds, and when paid into the proper treasury shall be and remain a specific fund for such purpose only; which said fund and the accumulations and proceeds thereof shall be invested, used and applied in the manner provided hereinbefore by this act.

"SEC. 7. This act shall take effect from and after its publication in the *Kansas Weekly Commonwealth*.

"Approved March 1, 1872.

"I hereby certify that the foregoing is a true and correct copy of the original enrolled bill now on file in my office, and that the same was published in the *Kansas Weekly Commonwealth* March 21, 1872.

W. H. SMALLWOOD, *Secretary of State.*

ARGUMENT.

By comparison, it will be seen that I have adopted the statement of the case, italics and all, presented by plaintiff in error.

From the facts there presented arise three questions:

First: IS THE LAW AUTHORIZING THE ISSUE OF THE BONDS IN QUESTION, CONSTITUTIONAL?

Second: CAN THERE BE AN INNOCENT HOLDER, WITHOUT NOTICE, OF SUCH BONDS?

Third: IS THE TOWNSHIP OF OXFORD ESTOPPED TO SET UP THE INVALIDITY OF THE BONDS WHEN SUCH INVALIDITY APPEARS UPON THEIR FACE?

Before proceeding to argue these questions, it may be well, in view of the earnest work of counsel to maintain two propositions which are not denied, to state that I do *not* claim—

1. That the law is unconstitutional because it is special and confers corporate powers on a township—the Supreme Court of this State having held that a township was not corporation enough to come within section 1, article 12 of the constitution, which prohibits the Legislature from passing any special act conferring corporate powers.

2. That a municipal corporation cannot be estopped the same as natural persons.

THE ACT UNCONSTITUTIONAL.

The act under which these bonds were issued is plainly in conflict with section 16 of article 2 of the constitution of Kansas. That section is as follows:

"SECTION 16. No bill shall contain more than one subject, which shall be clearly expressed in the title."

The Supreme Court of Kansas has had occasion to

construe this section, (*Commissioners of Sedgwick County vs. Baily*, 13 Kansas, 600,) and have held that it is mandatory — not discretionary with the Legislature, and that a violation of it renders an enactment void.

The section, it was shown, was inserted for a purpose. It was intended to make impossible that species of legislation, known as omnibus bills, which has so frequently disgraced Congress. It was intended to make it impossible for various interests, diverse in character but having public plunder for a common object, to unite their steals in one bill, and thus, by force of combination of interests, force them through.

It was intended to make impossible what was attempted in the very law in question. The *title* provides that the township *may* subscribe ten thousand dollars of stock in the Oxford Bridge Company. The act says the township *shall* issue $10,000 in bonds for the purpose of *aiding* in building a bridge across the Arkansas river. The title *authorizes a subscription of stock;* the act *directs a donation of bonds.* This will be apparent by an examination of the act. There is nothing in it which intimates that any stock or other consideration is to be received for the bonds; on the contrary, it is clearly shown to be merely a donation to *aid* an enterprise.

The act being special, all the rights, duties and mutual obligations of the parties must be found therein. It is, if anything, a contract which must stand by itself and neither party can be aided by anything outside of it. Treating it, then, as an entirety — as containing in itself all the rights and obligations of the parties — let us see if the subject in the title is the subject in the act. If there were nothing in the bill except what the title shows, would there be authority for

a donation—for anything but a subscription of stock, a *quid pro quo?* On the other hand, if the act stood alone could the township—having issued and delivered its bonds—compel the issue of certificates of stock by virtue of the act? If it could not, then it follows that the subject in the title and in the act are different and the act is void.

The effect of a difference, apparently slight, between the constitution of a State and a law intended to have been framed in conformity therewith, but really varying from it, is strikingly shown by the decision of this court in the case of *Harshman vs. Bates Co.*, reported in 3 Central Law Journal, 367. In that case it was held—the point being raised for the first time in this court, and not made in the Circuit Court—that a constitutional provision requiring the "assent of two-thirds of "the qualified voters" of the municipality issuing bonds to authorize their issue was not complied with by a law which authorized the issuance of bonds on the assent of "two-thirds of the qualified voters *voting at the election.*" The court holding that there was a broad difference between the two expressions, and this too in the face of the fact that the Supreme Court of the State whose constitution was thus construed (Missouri) had previously held, in substance, that there was no distinction between the expressions.

Again, in the first case of *Concord vs. Portsmouth Savings Bank*, this court held that bonds voted as a donation, but not issued until after the adoption by Illinois of the following constitutional provision, were absolutely void:

"No city, town, township, or other municipality, shall ever become subscribers to the capital stock of any railroad or

private corporation, or make its donation to, or loan its credit in aid of, such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption."

Void, because the power to make donations had been taken away before the bonds were issued, and the only right reserved was to make good previously authorized subscriptions, they being in the nature of a contract.

Apply that provision to the case here. Suppose such a provision had been adopted in this State after the bonds in suit were voted, but before they were issued: looking at the title alone, this court would say the bonds came within the *proviso* as a *subscription* authorized by vote before the adoption of the article; looking at the act alone, it would be held that the bonds were a donation, and therefore prohibited by the article.

Surely, if any force is to be attached to a constitutional provision, here is as proper a case for it as was presented in either the Missouri or Illinois case just referred to.

CAN THERE BE AN INNOCENT HOLDER, WITHOUT NOTICE, OF THESE BONDS?

Or, to meet the very peculiar views of the plaintiff in error, can there be an innocent holder, without notice, of these coupons?

The bonds were issued, as shown on their face, on the 15th day of April, 1872, and recite that they were issued in pursuance of the law set out in the statement of the case. That law was approved March 1, 1872, but was to take effect from and after its publication. It was published on the 21st of March, and became a law only from that date. Counsel for

plaintiff asserts that it became a law on its approval. He says:

"Section 19 of article 2 of the constitution of the State of Kansas provides that no law of a *general nature* shall be in force until the same be published. The act under which the bonds were issued is a *special act*, hence might have taken effect and become a law *without publication*, there being *no* constitutional requirement for the publication of *special acts*."

The statement of what the constitution says, and the inference drawn therefrom, are equally incorrect.

Here is section 19, article 12, to speak for itself:

"SEC. 19. The legislature shall prescribe the time when its acts shall be in force, and shall provide for the speedy publication of the same; and no law of a general nature shall be in force until the same be published."

The constitution says that the Legislature shall say when its acts—general or special—shall be in force. The Legislature said the act in question should be in force after the 21st of March, 1872, and the Supreme Court of this State (*George vs. Oxford Township*, 16 Kas., 72) said that it was in force only after that date. The bonds, then, were issued April 15, 1872, and recited a compliance with the law in question. That act provided that no bonds should be issued unless authorized by the people at an election, of which at least thirty days notice should be given (section 5). The Supreme Court says, in the case referred to, that this provision is mandatory—that the Legislature evidently meant that no bonds should be issued without an election, and that "no such election should be held "within less than thirty days after the act should take "effect; and the Legislature evidently intended that no "such election should be held unless at least thirty "days notice thereof should first be given." (*George vs. Oxford Township*, 16 Kas., 72.)

These bonds were issued in less than thirty days before the act, under which they purport to have been issued, became a law, and this fact appears upon their face.

To avoid the conclusive force of this fact, the plaintiff urges three of the most curious points ever made in a legal argument—so funny, in fact, that if they were not before me in print I would not seriously charge him with holding them. They are as follows:

1. That the recital in the bond estops the township to deny anything therein contained, but is notice to the plaintiff of only so much of the recital as he wants to know.

2. That because plaintiff bought the coupons when *detached* from the bonds, the recitals in the bond only bind him so far as they protect his rights. In other words, the recitals are a part of his coupons when he needs them to shut off defenses, but are no part of his coupons when they bring notice home to him of their invalidity.

3. That the plaintiff, being a resident of New York, is presumed to be ignorant of the law of the State in which the contract was made—the law which enters into and becomes a part of the contract.

Lest I may be accused of misstating counsel, I quote what he says, italics and all:

"Thus it will be seen that the township trustee, treasurer, and clerk, or any two of them, were constituted the agents of the township to execute the power granted, and were therefore fully clothed with authority to determine whether or not the *precedent facts* existed to warrant the issuing of the bonds. The trustee, treasurer and clerk detemined that the *precedent facts* existed to warrant the issuing of the bonds, and accordingly issued the same, reciting upon the face of the bonds that such *precedent facts* existed, that is, that such bonds *were issued in pursuance of the act*, and *in*

pursuance of a majority vote of the qualified electors of the township, had at an election held therein for that purpose. This determination is *final* and *conclusive* against the township in this action by the plaintiff in error, who is a *bona fide* holder for value of the interest coupons sued on, and who purchased the same before due, when *detached* from the bonds. See *Marcy vs. The Township of Oswego; The Town of Coloma vs. Evans; The Town of Venice vs. Murdock*, and *The Town of Genoa vs. James O. Woodruff, et al.*—all decided by this court at the November term, A. D. 1875."

"The plaintiff in error, who is a *bona fide* holder for value of the interest coupons sued on, and who purchased the same before due, when *detached* from the bonds to which they were originally attached, is *not* charged with the notice of any irregularity in the matter of the notice of the time and place of holding the election at which such bonds were voted, that may appear upon the face of the same."

"The plaintiff in error is a resident and citizen of the State of New York, and is *not presumed* to have notice of the laws of the State of Kansas, but on the contrary, *is presumed* to be *unacquainted* with, and *ignorant* of, such laws, and can only be charged with knowledge of the same by *actual proof* of the fact. See Edwards on Bills and Promissory Notes, page 348; Kerr on Fraud and Mistake, 402; *The Bank of Chillicothe vs. Dodge*, 8 Barb., 233; *Curtis et al. vs. Leavitt*, 15 N. Y., page 193."

To make any serious comment on these extraordinary propositions, viewed as one harmonions whole, would be to "gild refined gold," and yet I cannot forbear a few suggestions. If the recital in the bond is a part of the coupon for any purpose, it is for all. The plaintiff cannot avail himself of a part of the recital and ignore the rest.

The bonds in suit, it is true, recited that the law had been fully complied with, and this would be sufficient to protect the plaintiff and estop the defendant if it were not for the fact that the bond showed upon its face that it recited a lie; *that it claimed to have given, under that law, thirty days notice of the election,*

when in fact there was no such law thirty days before the issue of the bonds themselves. A fact that the plaintiff knew — was bound to know — because the law was a part of his bond. But he only knew part of the law, his counsel says! He knew so much of the law as authorized the issue of those bonds, but did not know when it took effect! He knew that bonds might be issued, but did not know that at least thirty days notice of an election to authorize their issue must first be given! The officers who executed the bonds did not know, we are told, when the law took effect:

"The act was approved on the first day of March, 1872, and more than thirty days prior to the time of holding the election on the 8th day of April following, The most reasonable explanation of the matter is, that upon the approval of the act, the officers of the township, who resided more than one hundred and fifty miles from the capital of the State, where the Legislature was in session, believing that the act would be published and take effect immediately following its approval, as was then the custom respecting the publication of all acts, proceeded to and did give notice of the time and place of holding the election contemplated by the act, without reference to the time when the act was published and took effect."

Were it not irrelevant to this case, what a field of speculation the above extract from the argument of counsel would open to us! We might inquire what effect it would have had upon the bonds if the officers had lived two hundred miles from the capital of the State. If they had lived three hundred miles away, no man can estimate the presumptions they would have been entitled to. Then, too, they would be entitled to all the presumptions arising from the character of their member. If he was an energetic fellow, they would be entitled to the presumption that the law was introduced the first day of the session, passed the second, approved the third

and in force on the fourth. And this presumption would be stronger if such a mode of procedure were the "regular custom" of the Legislature! Again, backed by all these presumptions, suppose the officers had proceeded to issue these bonds, believing that the proper law would be passed because such was the "usual custom," and in fact no such law was passed on the subject at all! Would the bonds thus issued be valid? Would the *presumption* that a law would be passed because it was the "usual custom," outweigh the *fact* that no such law was passed, and thus give validity to the bonds? Suppose these officers had lived in Missouri, and—— but I will not pursue this curious inquiry further, lest it lead into the domain of metaphysics.

But it is urged by counsel that the plaintiff, being a citizen of New York, is *presumed* to be *ignorant* of this law, *unacquainted* with it, and can only be charged with notice of its contents by actual proof. If this presumption is true, we are in a bad way, for we have not shown, nor can we, that the law was ever proved to him as a fact. Presumed to be *unacquainted* with the law under which his bonds were issued, the *lex loci contractus* which enters into and forms a part of his bonds! Surely, it is high time to introduce him! Presumed to be ignorant of the law? It does seem to me that if this presumption were invoked for counsel instead of client, it would more readily be acquiesced in.

Before passing from this branch of the case, which I have treated as seriously as I could, I will add that the validity of this law and these very bonds has been before the Supreme Court of Kansas, and the bonds held void. The decision in that case is printed

as an appendix to this argument. I do not claim for that decision that it makes this case *res adjudicata*, but I do claim that it is the decision of a court construing the meaning of a statute of the State, a decision which has never been departed from, and is consequently, so far as it construes the law in question, binding on this court.

ESTOPPEL.

If counsel had shown as much energy in proving that the recital in this case created an estoppel as he has in demonstrating the uncontradicted doctrine that a municipal corporation may be estopped the same as a natural person, he would have possibly lightened the labors of the court. In showing the existence of such a doctrine, the essential elements of an estoppel have been strangely overlooked.

To constitute an estoppel, the party claiming the benefit of it must have been ignorant of the facts of the case, and have been misled by the false declaration or conduct of the party against whom he pleads the estoppel.

In Kent's Com. (Comstock's edition), vol. 4, page 282, the author says:

"The sense of estoppel is, that a man, for the sake of good faith and fair dealing, ought to be estopped from saying that to be false which, by his means, has once become accredited for truth, and by his representations has led others to act."

These essentials are recognized by every law writer and every court in the land, and notably by this court. In fact, from the very nature of estoppel these elements are necessary to create it.

In all cases in this court, either quoted in plaintiff's argument or found in the reports of this court, the estoppel is only applied to innocent holders *without*

notice. In this case the plaintiff knew that the recital was false; that the proper notice of election could not have been given, and that such notice of election was essential to the validity of the bonds. Now, suppose the recital was a complete one, and there was no evidence of invalidity on the face of the bonds: could a man with full knowledge of the fraudulent character of such bonds, knowing that no authority existed for their issue, knowing that no election had been held, and, generally, that none of the prerequisites to the issue of the bonds had been complied with, create an estoppel in his favor by saying these things to the officers, but proposing to buy the bonds if there was placed in it a proper recital? Certainly not. He might transfer them to an absolutely innocent holder, without notice, in whose favor the recital would be an estoppel, but it would not be in favor of such first party. He could take nothing by it, because, in fact, he knew that the bonds were void for want of authority to issue them.

Nor do the alleged facts, that interest was paid and the stock taken by the township, create an estoppel. If there was no authority to issue these bonds — as the fact is — there could be no estoppel. And if an estoppel could be created at all in such a case, the circumstances mentioned here, which are thrown in for buncombe and not because they are true, would not be sufficient. The acquiescence shown by payment of taxes should be long continued — long enough at least to raise the presumption that the officers who wrongfully issued the bonds had been retired from office. The subscription of stock alleged is also of no consequence. There being no authority for the issue of

bonds, there could be no estoppel by reason of such alleged subscription of stock. Besides, there was no authority for a subscription of stock. The law did not allow it, and if the officers did make such subscription, it was, like the issue of the bonds, entirely without authority of law, and void.

REGISTRATION.

Some stress is laid on the fact that these bonds were registered. No one more strongly believes than I do in the force of registration as a recital; but the answer to the argument in this case is twofold and easy:

1. What I have said about the recital itself applies to registration. If the want of authority appears on the face of the bond, no recital that it is not there will remove it.

2. There is no law in Kansas authorizing the registration of these bonds—hence the pretended registration amounts to nothing. The registration law of 1872 authorizes registration of two classes of bonds: those issued under that law, and those issued thereafter in pursuance of a contract made before the passage of the law. These bonds come under neither class. An examination of the law will clearly show this:

"SEC. 15. That the holders of bonds heretofore issued, or that may hereafter be issued, in pursuance of any contract heretofore made, under any law of this State, may have the benefits of this act, by having such bonds registered in the office of said Auditor of State, as provided herein for the registration of such bonds [issued] by virtue hereof. It shall be the duty of the Auditor of State, upon the registration of any bonds not issued under the provisions of this act, within ten days thereafter, to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds."

APPENDIX.

ORIGINAL PROCEEDING IN MANDAMUS.

Jesse George
vs.
Oxford Township. } OPINION.

By the Court. . . . . . VALENTINE, J.

Passing over all preliminary and minor questions, the main question presented to us in this case is, whether certain bonds issued by the township of Oxford, in Sumner county, Kansas, to the Oxford Bridge and Ferry Company, a private corporation of said township, are valid. Said bonds show upon their face that they were issued on April 15th, 1872, "in pursuance of an act of the Legislature of the State of Kansas, entitled 'An act authorizing the trustee, treasurer and clerk, (or any two of them,) of the township of Oxford, county of Sumner, State of Kansas, to subscribe for stock in the Oxford Bridge Company to the amount of ten thousand dollars, to aid in the construction of a bridge across the Arkansas river at Oxford, in said county and State, and to issue the bonds of said township in payment therefor,' approved March 1st, 1872; and in pursuance of a vote of the qualified electors of said township had at an election held therein on the 8th day of April, A. D. 1872." Said act took effect March 21st, 1872. (Laws of 1872, page 320, 321.) It provides for issuing "the bonds of said township to the amount of ten thousand dollars, for the purpose of aiding in building and constructing a bridge across the Arkansas river at the town of Oxford, in said county and State." (Sec. 1.) But to whom the bonds were to be issued is not designated in the act, and the body of the act does not anywhere provide for subscribing stock in the "Oxford Bridge and Ferry

Company," or in any other company or corporation. The title of the act mentions the "Oxford Bridge Company." Said act also provides that "before any of the bonds hereinbefore mentioned shall be issued, the question of issuing said bonds shall be submitted to the legal voters of said township, at an election to be held for that purpose, which said election shall be conducted in all respects in conformity with the general election laws of this State. The time and place of holding said election shall be designated by the said trustee, treasurer and clerk (or any two of them), by giving at least thirty days notice by posting written or printed notices thereof in three of the most public places in said township." (Sec. 5.) Now, the election to determine whether the bonds should be issued or not, was in fact held on the 8th day of April, 1872, only eighteen days after the act authorizing the issue of the bonds took effect; and this is shown upon the face of the bonds. The notices of the election were in fact given only from March 24th, 1872, to the day of election, only fifteen days instead of thirty days, as the act prescribes; but this is not shown on the face of the bonds. And the bonds were in fact issued on April 15th, 1872, only twenty-five days after the act took effect; and this is shown on the face of the bond. We do not mean that the time when the act took effect is shown on the face of the bond, but it is shown on the face of the bond under what act and under what election the bonds were issued and when the election was held, and when the bonds were issued; and every one having anything to do with the bonds is required to know when the act under which they were issued took effect, and therefore what time elapsed after the act took effect till the election was held and the bonds issued.

Now we think the election under which the bonds were issued was void—

First, Because sufficient time had not elapsed after the act took effect and before the election was held.

Second, Because sufficient notice of the election had not been given, and could not have been given, after the act took effect and before the election was held.

And we think the bonds are void because no sufficient or valid election was held authorizing their issue. The Legislature evidently intended that no bonds should be issued unless an election authorizing their issue should first be held. The Legislature evidently intended that no such election should be held within less than thirty days after the act should take effect; and the Legislature evidently intended that no such election should be held unless "at least thirty days notice" thereof should first be given. The bonds in this case were issued in less than thirty days after the act authorizing their issue took effect. As we have already stated, the bonds do not show upon their face that the township board did not at least thirty days prior to said election call the election and give notice thereof; but even if they had done so, their action in that respect would have been void. Thirty days prior to said election there was no law in force authorizing the township board to call an election for any such purpose or to give any notice of such an election. There is no room, therefore, for any innocent or *bona fide* purchaser of the bonds to suppose that the election was legally called or that the proper notices thereof were legally given. And as this is an election that depends for its validity upon being legally called, and upon legal and proper notice thereof being given for at least thirty days prior to the election, and as these things were not done, the election must be held to be invalid.

This is wholly unlike an election where the object of the election and the time and place for holding the same are all fixed by law. There, the election is valid although a notice required by law may not be given. In such a case, the electors are presumed to know the law; they are presumed to know what is to be done at the election and the time and place for holding the same, because these are all fixed by law. Where "the time and place" of holding the election are to be "designated" by some board or person, as in this case, and are not fixed by law, then the notice required by law must be given; and if the time "designated" be so near in the future that legal notice can not be given, then

the election must be held to be void. (*Beal vs. Ray*, 17 Ind., 554.) As to the necessity for sufficient notice in certain special elections, see *People vs. Porter*, 6 Cal., 26; *McCune vs. Weller*, 11 Cal., 49; *People vs. Martin*, 12 Cal., 409; *Westbrook vs. Rosborough*, 14 Cal., 180. See also *Jones vs. The State*, 1 Kas., 273; *Gossard vs. Vaught*, 10 Kas., 162.

The judgment in this case must be rendered for the defendant. All the Justices concurring.

A true copy. Attest:

A. HAMMATT, *Clerk Supreme Court.*